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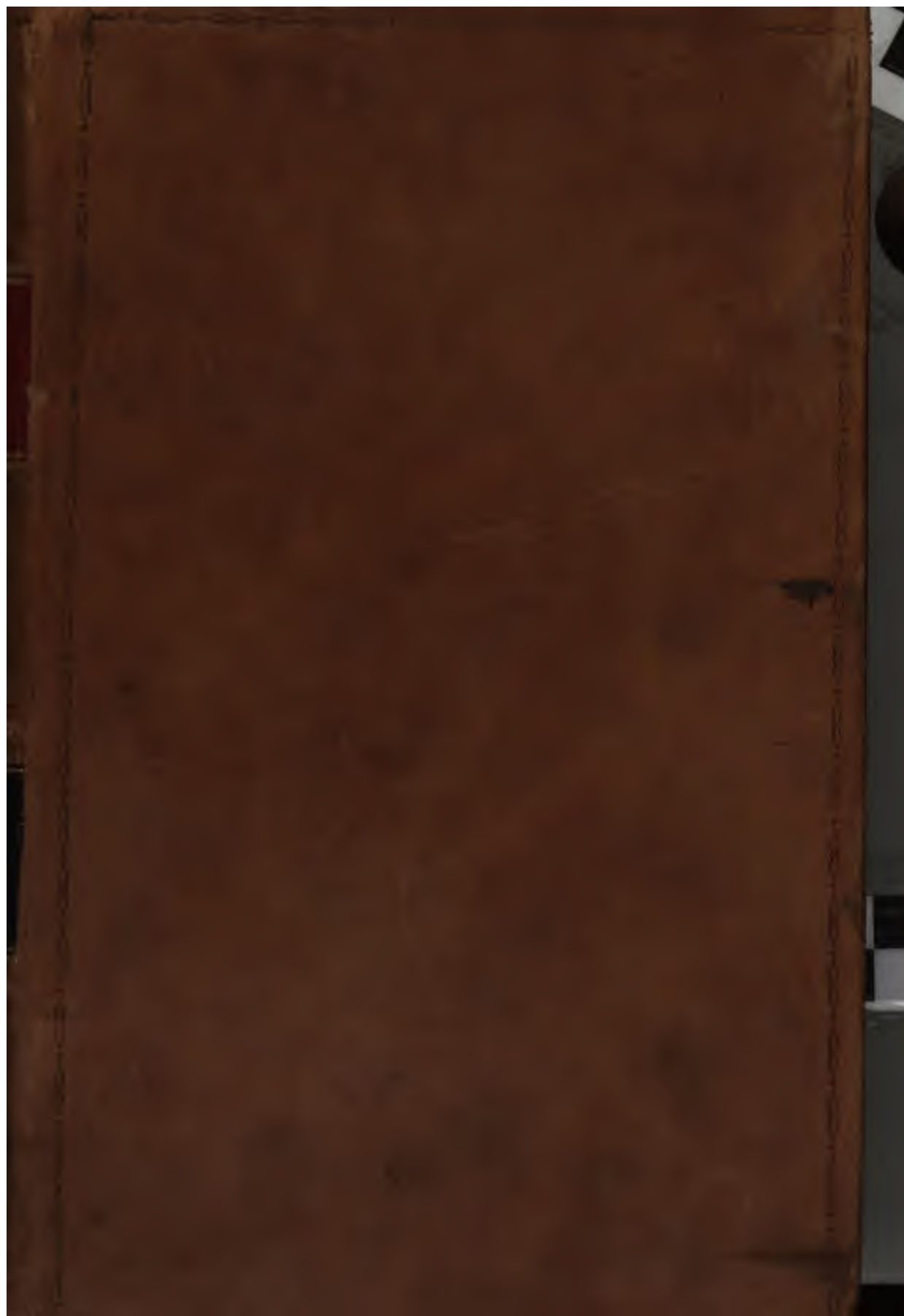
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THE  
MISCELLANEOUS DOCUMENTS

OF THE  
SENATE OF THE UNITED STATES

FOR THE  
FIRST SESSION OF THE THIRTY-FIFTH CONGRESS.

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IN FOUR VOLUMES.

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1858.





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IN THE SENATE OF THE UNITED STATES.

MARCH 6, 1856.—Referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Court of Claims.

The COURT OF CLAIMS submitted the following

REPORT.

SHEPHERD KNAPP *vs.* THE UNITED STATES.

*To the Senate of the United States:*

The undersigned, by direction of the Court of Claims, in pursuance of law, herewith respectfully transmits the following papers in the case above mentioned:

1. Petition of Shepherd Knapp.
2. Opinion of the Court.

The case was submitted, by consent, without briefs.

[L. S.]

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

WASHINGTON, *March* 5, 1856.

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SHEPHERD KNAPP *vs.* THE UNITED STATES.

The opinion of the Court was delivered by Judge SCARBURGH:

In the month of September, A. D. 1838, the petitioner was duly appointed army and navy pension agent of the United States for the city of New York, and continued to hold that office till the 29th day of January, A. D. 1842.

At the time of his appointment, and for the next succeeding five years, no provision existed by law for the compensation of pension agents, or the payment of the expenses of pension agencies. His predecessor, in a correspondence which took place between him and the Secretary of War and the Commissioner of Pensions recently, before the petitioner succeeded him, had declined to continue in the agency

without compensation and payment of expenses, and claimed such compensation as well for past as future services; but both the Secretary and the Commissioner of Pensions requested him to continue in office, and assured him that Congress would make provision for the payment of his claim.

The petitioner accepted the appointment of pension agent in the full belief that his compensation and expenses would be provided for by the government, as his predecessor had been assured, and upon no expectation or understanding whatever that he was to transact the business at his own expense, and without compensation. He continued the correspondence with the departments, which had been begun by his predecessor, and expressly and repeatedly declined to continue in the discharge of the duties of the office unless the promised provision was made. But was induced to go on by the assurance, from time to time, of the departments that his compensation and expenses would be provided for.

The petitioner alleges that a room was actually and necessarily occupied by him during his continuance in office, at No. 33 Wall street, for the business of his agency, the rent of which was \$700 per annum. The services of three clerks were also required and furnished during the same period—one at \$1,000, one at \$500, and one at \$300, per annum—the duties and accounts of the agency, which is the largest in the United States, having been extensive and onerous.

The petitioner claims five thousand dollars for five years' services, at one thousand dollars per annum, and the further sum of twelve thousand dollars for rent and clerks' hire, during the same period, at the rates above mentioned, together with interest thereon, if allowable, against the government.

In the month of March, A. D. 1854, the petitioner presented a petition to Congress asking for the payment of his claim. It was referred, with several similar petitions from other pension agents, to the Committee on Military Affairs. That committee, on the 18th day of April, A. D. 1854, made a favorable report, accompanied by a bill.

On the 20th day of April, A. D. 1836, the following act of Congress was passed: "That all laws and parts of laws authorizing or requiring the Bank of the United States, or its branches, to pay any pensions granted under the authority of the United States, shall be, and the same are hereby, repealed; and such payments shall be hereafter made at such times and places, by such persons or corporations, and under such regulations as the Secretary of War may direct; but no compensation or allowance shall be made to such persons or corporations for making such payments, without authority of law."—(5 Stat. at Large, 16.) This act continued in full force till the 20th day of February, A. D. 1847, when the following act was passed: "That, from and after the passage of this act, the Secretary of War is hereby authorized to make such compensation to agents for paying pensions as may be just and reasonable, to be paid out of the fund appropriated for the payment of revolutionary pensions, but in no case to exceed two per centum on moneys disbursed by them, the said compensation to be in full for all their services, and any contingent expenses that may arise in the discharge of their official duties, books, printing, and stationery, ex-

cepted: *Provided*, That the amount of compensation allowed to any one pension agent shall not exceed one thousand dollars per annum: *And provided further*, That the Secretary of War shall so regulate the remittances made to pension agents as to prevent an undue accumulation of balances in their hands."—(9 Stat. at Large, 127.)

By the express terms of the act of February 20, A. D. 1847, it is prospective only in its operation. The consequence is, that during the whole period for which the petitioner claims compensation for his services, there was an act of Congress in full force, which, in clear and unequivocal language, declared that "no compensation or allowance shall be made" to any pension agent, "without authority of law." It was not, therefore, competent for the Secretary of War, at any time during that period, to make a contract binding on the United States for the compensation of any person whom he might appoint to pay pensions. Nor is it alleged by the petitioner that the Secretary of War did undertake to make any such contract. All that he did was to assure the petitioner that he should recommend the passage of a law providing for his compensation, and that his expectation was, that such an act would be passed. The petitioner relied on this assurance, and acted upon it. But these circumstances are insufficient to constitute a contract, either express or implied, on the part of the United States, to make compensation to the petitioner for his services. So far from this being the case, the law then was, that no compensation or allowance should be made to any person for paying pensions, without authority of law.—(The United States *vs.* Joseph White *et al.*, in circuit court of Maryland.) "Without authority of law" means, we think, without authority of an act of Congress; and the clear meaning of the statute was, that no compensation or allowance should be made to a pension agent until Congress should by law provide for it. The necessary result is, that those who acted as pension agents whilst that law was in force, must be regarded as having acted with the full knowledge that the law forbade the making of any compensation to them, and that the United States were under no legal obligation to compensate them.

This court, therefore, has no jurisdiction to grant relief to the petitioner.

But we entirely concur in the following remarks made by the Committee on Military Affairs in the Senate, in the report to which we have already referred: "It is not to be presumed that these persons would serve as agents of the government—providing their own books and stationery, employing their own clerks, paying their own office rent, and, in many instances, advancing their own funds to pay the pensions—unless they were induced to do so by the promise and expectation of adequate compensation. The Secretary of War and the Commissioner of Pensions, in their annual reports to the first session of the twenty-sixth Congress, and in their reports before and since, call the attention of Congress to the necessity and justice of making provision for the payment of these agents, and the committee think it only reasonable that they should be paid for services rendered under such circumstances."

In addition to these considerations, we may be allowed to make

this further suggestion : Whilst Congress, by the act of April 20, A. D. 1836, plainly designed to reserve, and did reserve, absolute control over this subject, still the reasonable inference from that act is, that it was the intention of Congress, if, in its wisdom, it should thereafter deem it proper, to authorize by law the compensation of the agents who might be appointed under that act. It manifestly contemplated the contingency that this might become proper and right. Whether it should be done or not, Congress clearly designed should depend upon circumstances to be subsequently developed, and upon its own discretion ; for it is the obvious intention of the act of 1836 to protect the United States from any legal obligation to compensate those agents. Hence it was that the petitioner, and doubtless other pension agents, acted, and we think might reasonably have acted, under the impression that Congress would provide by law for the allowance of a fair and just compensation to them, or, in other words, that the authority of law for that purpose would be granted, if justice and right should require it. But whether this shall be done must depend entirely on Congress.

No order will be made authorizing testimony to be taken in this case.

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COURT OF CLAIMS.

SHEPHERD KNAPP }  
                   vs.        } *Petition.*  
 THE UNITED STATES. }

*To the honorable the Judges of the Court of Claims :*

The petition of Shepherd Knapp, of the city of New York, respectfully shows that, in the month of September, 1838, being then, and ever since, president of the Mechanics' Bank, in said city, he was duly appointed army and navy pension agent of the United States for said city of New York, and continued to hold said office, and to discharge the duties thereof, to the acceptance of the government in all respects, from thence to the 29th of January, 1842.

At the time of his said appointment, and during the five years next succeeding, no provision existed by law for the compensation of pension agents, or the payment of the expenses of pension agencies. Previous to and up to the time of said appointment, Jacob Lorillard had been president of said bank and pension agent. The petitioner, on succeeding said Lorillard in those offices, found that a correspondence had then recently taken place between said Lorillard and the Secretary of War and the Commissioner of Pensions, in which said Lorillard declined to continue in said agency without compensation and payment of expenses, and urged his claim for such compensation and expenses, as well for past as future services. The Secretary and Commissioner fully admitted the justice of the claim ; said that they were in constant expectation of provision being made by Congress for such payments, in compliance with recommendations they had made, and requested Mr. Lorillard to continue in said office, in view of the expected compensation, and for the assistance and convenience of the government.

Under these circumstances the petitioner accepted the appointment of pension agent, upon succeeding Mr. Lorillard in the presidency of the bank, in the full belief that his compensation and expenses would be provided for by the government, as Mr. Lorillard had been assured, and upon no expectation or understanding whatever that he was to transact the business at his own expense, and without compensation. In furtherance of this view, he continued the correspondence on the subject with the departments which had been commenced by Mr. Lorillard, and expressly and repeatedly declined to continue in the discharge of the duties of the office unless the promised provision was made, but was induced to go on by the assurance, from time to time, of the departments that his compensation and expenses would be provided for. Beside the correspondence that took place, the petitioner went several times to Washington, and had personal interviews on the same subject with the Secretary of War and the Commissioner of Pensions with the same result.

And the petitioner further shows, that the government deposits in said Mechanics' Bank, for the payment of pensions, were not, at any time during the period for which compensation is now claimed, sufficient to make it desirable for said bank, or for the petitioner, as president thereof, to continue the payment of pensions without remuneration. On the contrary, owing to the depressed condition of the public finances which then existed, the government account at the bank was frequently and sometimes largely overdrawn, and advances were made by the bank at various times for the payment of pensions; while, at other times, the payment of pensions was necessarily suspended by the bank, on account of the want of deposits for that purpose. This deficiency in the deposits was a frequent source of embarrassment to the bank, in the pressure which then prevailed in the money market, and the petitioner had frequently to exert his influence with the directors to induce them to continue longer the payment of pensions for the government upon the deposits furnished. And the petitioner further shows, that, by act of Congress of February 20, 1847, provision was made for the compensation of pension agents thereafter, and the payment of their necessary expenses, in compliance with the recommendation of the departments above alluded to, and that under that provision his successor has received since that time the sum of one thousand dollars per annum as compensation for his services as pension agent. But the petitioner has never received any payment for his services, or for expenses incurred prior to that time.

And the petitioner further represents, that his services during that time were worth at least the sum of one thousand dollars per annum, being the amount his successor has since received for discharging the duties of the office under circumstances much less difficult. That a room was actually and necessarily occupied by him during that period, at No. 33 Wall street, for the business of said agency, the rent of which was \$700 per annum. That the services of three clerks were also required and furnished during the same period—one at \$1,000, one at \$500, and one at \$300 per annum—the duties and accounts of the agency, which is the largest in the United States, having been extensive and onerous.



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[REDACTED]



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1. Petition of Shepherd Knapp.
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The case was submitted, by consent, without briefs.

[L. S.] SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

WASHINGTON, *March* 5, 1856.

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The opinion of the Court was delivered by Judge SCARBURGH :

In the month of September, A. D. 1838, the petitioner was duly appointed army and navy pension agent of the United States for the city of New York, and continued to hold that office till the 29th day of January, A. D. 1842.

At the time of his appointment, and for the next succeeding five years, no provision existed by law for the compensation of pension agents, or the payment of the expenses of pension agencies. His predecessor, in a correspondence which took place between him and the Secretary of War and the Commissioner of Pensions recently, before the petitioner succeeded him, had declined to continue in the agency

without compensation and payment of expenses, and claimed such compensation as well for past as future services; but both the Secretary and the Commissioner of Pensions requested him to continue in office, and assured him that Congress would make provision for the payment of his claim.

The petitioner accepted the appointment of pension agent in the full belief that his compensation and expenses would be provided for by the government, as his predecessor had been assured, and upon no expectation or understanding whatever that he was to transact the business at his own expense, and without compensation. He continued the correspondence with the departments, which had been begun by his predecessor, and expressly and repeatedly declined to continue in the discharge of the duties of the office unless the promised provision was made. But was induced to go on by the assurance, from time to time, of the departments that his compensation and expenses would be provided for.

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this further suggestion : Whilst Congress, by the act of April 20, A. D. 1836, plainly designed to reserve, and did reserve, absolute control over this subject, still the reasonable inference from that act is, that it was the intention of Congress, if, in its wisdom, it should thereafter deem it proper, to authorize by law the compensation of the agents who might be appointed under that act. It manifestly contemplated the contingency that this might become proper and right. Whether it should be done or not, Congress clearly designed should depend upon circumstances to be subsequently developed, and upon its own discretion ; for it is the obvious intention of the act of 1836 to protect the United States from any legal obligation to compensate those agents. Hence it was that the petitioner, and doubtless other pension agents, acted, and we think might reasonably have acted, under the impression that Congress would provide by law for the allowance of a fair and just compensation to them, or, in other words, that the authority of law for that purpose would be granted, if justice and right should require it. But whether this shall be done must depend entirely on Congress.

No order will be made authorizing testimony to be taken in this case.

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COURT OF CLAIMS.

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At the time of his said appointment, and during the five years next succeeding, no provision existed by law for the compensation of pension agents, or the payment of the expenses of pension agencies. Previous to and up to the time of said appointment, Jacob Lorillard had been president of said bank and pension agent. The petitioner, on succeeding said Lorillard in those offices, found that a correspondence had then recently taken place between said Lorillard and the Secretary of War and the Commissioner of Pensions, in which said Lorillard declined to continue in said agency without compensation and payment of expenses, and urged his claim for such compensation and expenses, as well for past as future services. The Secretary and Commissioner fully admitted the justice of the claim ; said that they were in constant expectation of provision being made by Congress for such payments, in compliance with recommendations they had made, and requested Mr. Lorillard to continue in said office, in view of the expected compensation, and for the assistance and convenience of the government.

Under these circumstances the petitioner accepted the appointment of pension agent, upon succeeding Mr. Lorillard in the presidency of the bank, in the full belief that his compensation and expenses would be provided for by the government, as Mr. Lorillard had been assured, and upon no expectation or understanding whatever that he was to transact the business at his own expense, and without compensation. In furtherance of this view, he continued the correspondence on the subject with the departments which had been commenced by Mr. Lorillard, and expressly and repeatedly declined to continue in the discharge of the duties of the office unless the promised provision was made, but was induced to go on by the assurance, from time to time, of the departments that his compensation and expenses would be provided for. Beside the correspondence that took place, the petitioner went several times to Washington, and had personal interviews on the same subject with the Secretary of War and the Commissioner of Pensions with the same result.

And the petitioner further shows, that the government deposits in said Mechanics' Bank, for the payment of pensions, were not, at any time during the period for which compensation is now claimed, sufficient to make it desirable for said bank, or for the petitioner, as president thereof, to continue the payment of pensions without remuneration. On the contrary, owing to the depressed condition of the public finances which then existed, the government account at the bank was frequently and sometimes largely overdrawn, and advances were made by the bank at various times for the payment of pensions; while, at other times, the payment of pensions was necessarily suspended by the bank, on account of the want of deposits for that purpose. This deficiency in the deposits was a frequent source of embarrassment to the bank, in the pressure which then prevailed in the money market, and the petitioner had frequently to exert his influence with the directors to induce them to continue longer the payment of pensions for the government upon the deposits furnished. And the petitioner further shows, that, by act of Congress of February 20, 1847, provision was made for the compensation of pension agents thereafter, and the payment of their necessary expenses, in compliance with the recommendation of the departments above alluded to, and that under that provision his successor has received since that time the sum of one thousand dollars per annum as compensation for his services as pension agent. But the petitioner has never received any payment for his services, or for expenses incurred prior to that time.

And the petitioner further represents, that his services during that time were worth at least the sum of one thousand dollars per annum, being the amount his successor has since received for discharging the duties of the office under circumstances much less difficult. That a room was actually and necessarily occupied by him during that period, at No. 33 Wall street, for the business of said agency, the rent of which was \$700 per annum. That the services of three clerks were also required and furnished during the same period—one at \$1,000, one at \$500, and one at \$300 per annum—the duties and accounts of the agency, which is the largest in the United States, having been extensive and onerous.



The petitioner, therefore, claims that there was a legal as well as equitable contract on the part of the government to pay him for his services as pension agent, what they were reasonably worth, and the expenses necessarily incurred in discharging the duties of this office, and that, in pursuance of such contract, his services were rendered and expenses paid. And prays to be allowed by the court the sum of five thousand dollars for five years' services, at one thousand dollars per annum, and the further sum of twelve thousand dollars for rent and clerks' hire, during the same period, at the rates aforesaid, together with the interest thereon since due, if allowable against the government. And that said allowance may be reported by the Court to Congress as provided by law.

And the petitioner further shows, that, in the month of March, 1854, he presented a petition to Congress stating in substance the facts herein set forth, and asking for payment of his aforesaid claim. That said petition was presented in the Senate and was referred, with several similar petitions from other pension agents, to the Committee on Military Affairs; that on the 18th of April, 1854, said committee, by Hon. Mr. Shields, their chairman, made a report in regard to said claims in favor of paying the same, accompanied with a bill for that purpose, copies of which are hereto annexed and referred to, and that said bill failed to receive the final action of Congress.

Dated at New York, this 1st day of January, 1856.

S. KNAPP.

JNO. J. LATTING,

*Attorney for Petitioner.*

CITY AND COUNTY OF NEW YORK :

Shepherd Knapp, of said city, the claimant above named, being duly sworn, says that the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

S. KNAPP.

Sworn this 12th day of January, 1856, before me.

G. R. J. BOWDOIN,  
*Commissioner Court of Claims.*

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(Report and bill referred to in the foregoing petition.)

IN THE SENATE OF THE UNITED STATES.

APRIL 18, 1854.—Ordered to be printed.

Mr. SHIELDS made the following report:

[To accompany Bill S. 339.]

*The Committee on Military Affairs, to whom were referred the petitions of Daniel Hay and others, having had the same under consideration, report :*

The petitioners ask to be remunerated for their services as pension agents, prior to the 20th of February, 1847, and subsequent to the 20th of April, 1836.

It appears that upon the 20th of April, 1836, Congress repealed the law which authorized the Bank of the United States to pay pensions, (*vide* Statutes at Large, vol. 5, page 16,) and at the same time enacted, "That all such payments shall be hereafter made, at such times and places, by such persons or corporations, and under such regulations as the Secretary of War may direct; but no compensation or allowance shall be made to such persons or corporations for making such payments, without authority or law."

Soon after the passage of this act, many of the pension agents tendered their resignations, which, however, they were induced to withdraw, with the assurance that Congress would speedily compensate them for their services. Numerous efforts were from time to time made to fix the compensation of these officers, but nothing was done in the matter until the 20th of February, 1847, when an act was passed allowing pension agents a commission of two per cent. upon their disbursements, provided the same should not exceed in any case the sum of one thousand dollars per annum. But this law had no retrospective effect, and in consequence of this omission no compensation has been made to the pension agents who served during the whole or any part of the time from the 20th of April, 1836, to the 20th of February, 1847, nearly eleven years.

It is not to be presumed that these persons would serve as agents of the government—providing their own books and stationery, employing their own clerks, paying their own office rent, and, in many instances, advancing their own funds to pay the pensioners—unless they were induced to do so by the promise and expectation of adequate compensation. The Secretary of War and the Commissioner of Pensions, in their annual reports to the 1st session of the 26th Congress, and in their reports before and since, called the attention of Congress to the necessity and justice of making provision for the payment of these agents, and the committee think it only reasonable that they should be paid for services rendered under such circumstances.

And the committee, while examining this matter, although the subject has not been formally referred to them, have thought fit to consider the recommendation of the Commissioner of Pensions, made in his annual reports, (see S. Ex. Doc. No. 1, 33d Congress, 1st session, pp. 493-'4,) in which he states that the present compensation to agents for paying pensions is not adequate to the services and responsibilities of some of these agents. With a view, therefore, of carrying out the recommendation of the department, and of properly remunerating a number of worthy individuals for services cheerfully and faithfully performed without compensation, but with the expectation and promise thereof, the committee have reported a bill to embrace the whole subject, and confidently recommend its passage.

(S. 339.)

IN THE SENATE OF THE UNITED STATES, *April*, 18, 1854.

MR. SHIELDS, from the Committee on Military Affairs, submitted a report, (No. 218,) accompanied by the following bill; which was read and passed to a second reading :

A BILL making provision to compensate agents for paying pensions, and prescribing the time and manner of settling their accounts.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of the Interior be, and he is hereby, authorized and required to make suitable compensation to agents for paying pensions, but in no case shall such compensation exceed three per centum on the amount of moneys by such agent annually disbursed, and shall be paid out of the fund appropriated for the payment of revolutionary pensioners. Said compensation shall be in full for all services and contingent expenses of said agency, except for books, printing and stationery : *Provided*, That the amount of compensation allowed to any one agent shall not exceed the sum of one thousand five hundred dollars a year.

SEC. 2. *And be it further enacted*, That each of said agents shall state his account quarterly, and transmit the same to the proper accounting officer of the treasury for settlement, and a duplicate thereof to the Commissioner of Pensions. He shall also transmit semi-annually to said Commissioner the names of all pensioners on the lists in his agency at the commencement of each half year, to whom he was liable to make payments ; also the names of such pensioners as have been inscribed on said lists, or transferred to his agency during said time, and shall designate the names of those he has paid, those who have died, those whose pensions have terminated, those who have not demanded their pensions for fourteen months, those who have been transferred to other agencies, and the names of the female pensioners who have married.

SEC. 3. *And be it further enacted*, That the Secretary of the Interior shall regulate the remittances of funds to said agents for the payment of pensioners in such manner and at such times as to prevent any accumulation of balances in their hands.

SEC. 4. *And be it further enacted*, That the provisions of the first section of this act be also extended to those persons who served as pension agents prior to the twentieth of February, eighteen hundred and forty-seven, and subsequent to the twentieth of April, eighteen hundred and thirty-six, when no compensation was provided by law for such services.

IN THE SENATE OF THE UNITED STATES.

MAY 12, 1856.—Read and referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Court of Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled :*

The Court of Claims respectfully presents the following documents as the report in the case of

JOHN C. HALE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Solicitor's brief.
3. Opinion of the Court.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of May,  
[SEAL.] A. D. 1856.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

COURT OF CLAIMS.

JOHN C. HALE *vs.* THE UNITED STATES.

*To the honorable the Court of Claims of the United States, sitting in Washington :*

Your petitioner, John C. Hale, of Hot Springs county, Arkansas, respectfully represents that, under the 5th section of the act of April 12, 1814, chap. 52 of the acts of the second session of the thirteenth Congress, and in right of John Percifull, deceased, the original settler, he claims a right of pre-emption to the southwest quarter of section 33, in township 2 south, range 19 west of the 5th principal

meridian, on which are situated the celebrated hot springs of the county aforesaid.

Your petitioner avers that the worthy old pioneer, John Percifull, settled on the said tract of land as early as 1808 or 1809, and continued to cultivate and hold possession of the same, by himself or his tenants, without interruption, until his death in the year 1835 or 1836. That after the death of said Percifull, his widow and sole heir, Sarah and David Percifull, held continuous possession of the same until they sold their right to this petitioner, who continues the unbroken possession, as their assignee, down to the present hour.

Your petitioner owns and holds the right of the said John Percifull, by virtue of a valid assignment from the said widow and heir, and is ready to prove the same when it may be required. The consideration paid was the sum of thirteen thousand dollars. In addition to this expenditure, your petitioner has improvements on the land which have cost the further sum of ten thousand dollars. He admits that Henry M. Rector, of Arkansas, is entitled, under certain conditions, to three-eighths of the claim herein represented.

Your petitioner further represents that, at the time of the passage of the said act of 1814, the territory south of the Arkansas river, in which the land aforesaid is situated, was embraced within the county of Arkansas, one of the organized counties of the Territory of Missouri; and the impression universally prevailed that the said lands were public lands, subject to the right of pre-emption under the act aforesaid. It was, however, subsequently decided at the General Land Office of the United States, that the Indian title to said lands not being extinguished, the same were not subject to the right of pre-emption. By the treaty of August 24, 1818, between the United States and the Quapaw Indians, the Indian title was extinguished, and the said lands became the unencumbered property of the United States.

On the 20th April, 1832, at the first session of the twenty-second Congress, section 3, chapter 70, Congress enacted "*that the hot springs in said Territory, together with four sections of land, including said springs, as near the centre thereof as may be, shall be reserved for the future disposal of the United States, and shall not be entered, located, or appropriated for any other purpose whatever.*"

On the 1st March, 1843, (acts of the third session of the twenty-seventh Congress, chapter 50, section 3,) it was enacted "*that every settler on the public lands south of the Arkansas river shall be entitled to the same benefits accruing under the provisions of the pre-emption act of one thousand eight hundred and fourteen, as though they had resided north of said river.*" The object of this latter provision was to confirm the pre-emption rights of settlers on this Territory, notwithstanding the existence of the Indian title in 1814. This is apparent from the whole tenor of the said act of 1843, from the history of the Territory in question, and from the report of the committee of the Senate of the United States accompanying said act when it was first presented to said body.—(Senate Report, No. 36, at the second session of the twenty-seventh Congress.)

By virtue of the three acts aforesaid, or rather by virtue of the first

and last of said acts, and by virtue of the continued and uninterrupted possession of the said John Percifull, deceased, his tenants, heirs, and assignees, from 1814, and long previously, down to the present time, your petitioner claims the right to enter the said quarter section of land at the minimum price, and to obtain a patent for the same from the government of the United States.

The survey of the lands in question did not take place until early in the year 1838. Within a few months after that survey, Sarah and David Percifull, the widow and heir of John Percifull, attempted to prove their pre-emption. But inasmuch as the reservation made by the act of 20th April, 1832, was then in full force, and especially as the Indian title to said lands prevented the operation of the act of 1814, the said application was rejected.

In due time after the passage of the act of March 1, 1843, Sarah, the widow of said Percifull, offered to prove the right of pre-emption in the heirs of said John, and tendered the sum of two hundred dollars in gold, demanding to enter the same under the laws aforesaid. Her application was again rejected.

Your petitioner further represents that, in the year 1828, the said John Percifull, then living, leased his improvements on the said quarter section of land to one Ludovicus Belding for the term of five years. That under this lease, as the tenant of Percifull, the said Belding cultivated the said land in the year 1829, and then, before the expiration of his said lease, assigned the same to a third person. That in the year 1831 the said lease came again into the hands of the said John Percifull, who continued to occupy the place until his death as aforesaid. That afterwards, long after the said Belding had ceased to occupy or cultivate said land by himself or any one for him, the heirs of said Belding set up a claim for a right of pre-emption in said land, under the act of 29th May, 1830.—(First session twenty-first Congress, chap. 208.)

Your petitioner further states, that another claim was set up by Henry M. Rector, in the name of one Francis Langlois, pretending to have a valid New Madrid location, under the act of February 17, 1815, (Chap. 45, acts of the third sess. 13th Congress,) and covering the land in question. But no valid location was ever made in pursuance of that law, or at least none which has the effect to overreach the pre-emption claim herein set up, under the said law of 1814.

On the 23d of October, 1850, in view of the conflicting claims to the said land under the various laws mentioned, the Commissioner of the General Land Office, by the direction of the Secretary of the Interior, ordered the register and receiver of the land office at Washington, Arkansas, to give notice to the respective claimants, hear the testimony which might be presented by them, and report the same back to him with their judgment of the result. In pursuance of this order, the parties had notice to appear before the said register and receiver on the 20th day of January, 1851. There was no process by which witnesses could be forced to attend; and, unfortunately, some of petitioner's witnesses happened to be out of the State, and from the shortness of the notice none of them appeared on the day named, although your petitioner used all proper diligence in endeavoring to

procure their attendance. Two of these witnesses, however, appeared at the land office before the examination was concluded, and your petitioner asked that said witnesses might be examined ; but the said register and receiver absolutely refused to receive their testimony, alleging that they had already disposed of the Percifull claim, and were then examining the Belding and Rector claim ; your petitioner then asked that the said witnesses should be heard to testify in opposition to the claims then under examination, but this also was refused ; your petitioner then insisted that the refusal to hear said testimony should be entered on their record, which they refused. But the said officers promised to send up to the General Land Office a separate statement of the facts, and such a statement was made out and received by them as correct and proper, but the same has never reached the General Land Office. Your petitioner has filed in the General Land Office affidavits stating these facts, yet he believes they have never received any attention, either from the Commissioner or the Secretary of the Interior.

Your petitioner expressly avers that the said witnesses were men of good character, worthy of full credit, and were ready, from their own knowledge, to prove all the facts necessary to establish the right of John Percifull, deceased, to a pre-emption on the land aforesaid under the said act of 1814. Your petitioner has perpetuated their testimony, or such of it as could be obtained in a court of chancery in Arkansas, and is ready to produce it when required.

Notwithstanding this unjust and oppressive conduct of said register and receiver, such was the strength of your petitioner's case, that the receiver decided in his favor, while the register decided against him.

In the case of Belding's heirs, the receiver decided that as there was indubitable proof of Belding's occupancy in 1829, under a written lease from John Percifull, binding himself to make improvements for the benefit of his lessor, his heirs were not entitled to a pre-emption under the said act of 1830. The register, however, ignoring the full and ample proof of Belding's relation to Percifull as his lessee, decided that his heirs were entitled to a pre-emption in their own right.

Upon the receipt of the report of the register and receiver at the General Land Office in Washington, D. C., it was decided that the heirs of Belding should be allowed to make an entry, although, as your petitioner understands, it was at the same time asserted that they were not entitled to a pre-emption, and could not obtain a patent. The Secretary of the Interior, in his letter to the Commissioner of the General Land Office, dated November 21, 1851, says in reference to this entry : "The government will still hold the ultimate power of protecting its own rights, while the claimants will merely be placed in a position to contest the adverse claims of others to the same lands." Armed with the receiver's receipt, thus unjustly and illegally given, the heirs of Belding, under the statutes of Arkansas, have brought an action of ejectment against your petitioner, and while the government withholds the patent from the rightful owner, the spectacle may possibly be presented of a lessee setting up his possession against his acknowledged lessor, and ejecting him from property which he has held uninterruptedly for nearly half a century.

Your petitioner insists that, as the assignee of John Percifull's estate, he is entitled to a pre-emption under the act of 1814, as revived and re-established by the act of March 1, 1843. That his equity is prior to that of any other claimant, and that he is entitled to a patent upon payment of the minimum price of the public land. He further insists that, even if he were not able to prove, as he avers he is, and ready to prove, his pre-emption right under the said act of 1814, the entry allowed to the heirs of said Belding, if it be adjudged valid, ought to enure to his benefit, and he ought to be allowed to have the patent upon the same.

But the General Land Office and the Department of the Interior have finally decided that neither your petitioner nor the said heirs of Belding are entitled to a patent, although the entry of the said Belding's heirs is still permitted to remain uncanceled, with the sole effect of harassing this petitioner, without any possible advantage to government. The Secretary of the Interior and the Commissioner of the General Land Office, as well as the Attorney General of the United States, seem to have taken for granted, without much examination, that the act of reservation, passed in 1832, is still in force, not repealed by the act of 1843; and hence they have almost entirely overlooked the claim of John Percifull, and the important facts which established it as superior to all the opposing claims.

This Court should be of opinion that the act of 1843 supersedes and annuls the reservation made by the act of 1832, as against a valid pre-emption under the act of 1814, then this petitioner appeals to the records on file in the land office at Washington, Arkansas, and in the General Land Office at Washington, D. C., and also to other circumstantial proofs which he may be able to adduce in addition, for the establishment of his right to a pre-emption, and the issuance of a patent in pursuance of the same. He prays that his rights in the premises may be duly investigated by the Court, and if established to his satisfaction upon the law and the facts, that his claim may be referred to Congress for such action as may be necessary, and especially that the entry made by Belding's heirs be cancelled as illegal and void, and that the patent issue to your petitioner upon the payment of the legal price of the land.

In accordance with the rules of this Court the petitioner states that no other person except the said Henry M. Rector is interested in this matter; that he has never applied to Congress for relief; that he has applied to the General Land Office and to the Department of Interior, the executive officers seem to have paid little attention to his



personally appeared John C. Hale, the foregoing petitioner, and made oath in due form of law that the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

B. K. MORSELL, *J. P.*

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IN THE COURT OF CLAIMS.—No. 135.

ON THE PETITION OF JOHN C. HALE.

*Brief of the United States Solicitor.*

This petitioner claims the right of pre-emption of a quarter section of land on which the Hot Springs of Arkansas are situated, under 5th section of act of 12th April, 1814, ch. 52, and the 3d section of act of 1st March, 1843, ch. 50. This claim was presented to the land officers of the proper district in 1838, shortly after the surveys had been completed in that district, and rejected :

Because, 1st, the lands claimed were ceded to the United States by the Quapaw Indians in 1818, and were not subject to pre-emption under the act of 1814.

2d. Because, by the 3d section of the act of 20th April, 1832, ch. 70, it is enacted "that the Hot Springs in said Territory (of Arkansas,) together with four sections of land, including said springs, as near the centre thereof as may be, shall be *reserved* for the *future* disposition of the United States, and shall not be *entered, located, or appropriated for any other purpose whatever.*"

3d. Because, if it be admitted that the land is subject to pre-emption, the claimant has failed to make the proof of settlement as required by the act of 1814.

It is admitted in the argument, that at the date of this decision the land was not subject to pre-emption ; but it is insisted that the 3d section of the act of 1843, by which it is provided "that every settler in the public lands *south* of the Arkansas river shall be entitled to the same benefits accruing under the provisions of the pre-emption act of 1814 *as though they had resided north of said river,*" repealed the act of 1832, and subjected the land in question to pre-emption, and that his claim ought subsequently to have been allowed.

In answer to the objections to the insufficiency of the proof of settlement, the claimant alleges improper conduct on the part of the register and receiver in refusing to hear proof, &c. ; but it is not alleged that they acted fraudulently or from improper motives.

The authorities cited in the brief of claimant's counsel declare the decision of these officers to be final on the question of occupancy and settlement, when not impeached for fraud or unfairness.—(*Wilcox vs. Jackson*, 13 Peters, 513.)

On the question of the claimant's right of pre-emption, had settlement been duly proved, the decision of the Land Office is in accordance with the principles decided by the Supreme Court, in *Stoddard vs. Chambers*, 2 Howard, 284 ; *Mills vs. Same*, 8 Ib. 345 ; *Bissell vs. Penrose*, 8 Ib. 317 ; *Gear vs. United States*, 3 Ib. 120 ; and in *Wilcox*

*vs. Jackson*, 13 Peters, 513; where it is decided that neither a law giving the right of location under a New Madrid certificate, nor one giving the right of pre-emption of public land within a specified district, authorizes the location or pre-emption of land which, prior to the time when such location or pre-emption was attempted had been reserved from sale—for the obvious reason, that when, either because the land contained mines or salt springs, or other peculiar advantages, or because it was claimed by private individuals or was required for public purposes, it had been specially reserved from sale for future disposition, it was not to be supposed that general provisions of law having for their object the sale of land in the district the greater part of which had no mine or salt springs, &c., would repeal reservations made for special reasons which were not referred to in the general act.

The case at bar illustrates the subject. Before any locations or sales were allowed in Arkansas, Congress, by the act of 1832, provided that the sites of the Salt Springs and Hot Springs, and the contiguous land, shall not be subject to entry, &c., but shall be reserved for the future disposal of the United States. The second section authorizes the government to lease the Salt Springs for a term not exceeding five years, and directs the application of the rents. But as respects the Hot Springs, no authority is given to any one. In a few years, by a general law respecting pre-emptions in which not a word is said about Hot Springs or Salt Springs, this property, which was thought of so much value as to be expressly excepted from sale or disposition in any way, is supposed to have become private property at the minimum price. That such a result was intended, no one can contend, and it is the duty of the Court to carry out the purposes of the law.

But if the fact and law were both for the petitioner, I should object to the Court's entertaining his petition. He asks Congress to interfere, by its action, with questions effecting conflicting claims of individuals to specific property. It cannot be done fairly. The parties must be left to the courts, or to those officers who by law are invested with authority to hear all parties and decide between them.

M. BLAIR.

#### JOHN C. HALE *vs.* THE UNITED STATES.

Opinion of the Court delivered by GILCHRIST, C. J.

The petitioner claims a right of pre-emption to a tract of land, including the Hot Springs, in the State of Arkansas. He alleges that John Percifull settled on the land in 1808 or 1809, and cultivated and held possession of it until his death in the year 1835 or 1836; that after his death, his widow and heir, Sarah and David Percifull, possessed the land until they sold their right to the claimant, who now retains possession of it as their assignee. The claimant admits that Henry M. Rector is entitled to three-eighths of the claim under certain conditions.

In the year 1828 John Percifull leased the improvements on the land to one Belding for the term of five years. In 1829 Belding as-

signed the lease, and in 1831 it returned into the possession of John Percifull. After Belding had ceased to occupy the land, his heirs set up a claim for a right of pre-emption under the act of May 20, 1830.

Another claim to the land was set up by Henry M. Rector, in the name of Francis Langlois, professing to have a valid New Madrid location under the act of February 17, 1815, covering the land in question. But the claimant alleges that no valid location was ever made in pursuance of that law, or none which would overreach his pre-emption claim under the act of 1814.

If there were no claims antagonistical to that derived from Percifull, there would be no peculiar difficulty in determining the rights of the claimant. But whether he is entitled to a right of pre-emption, cannot be determined without an investigation into the Belding and Rector claims. It may be that if those claims are laid aside, the Percifull claim is valid. But it may also appear that one or both of these claims are superior to the Percifull claim. We are asked to determine that the petitioner has the right to enter this quarter section of land at the minimum price, without having before us all the elements necessary to enable us to come to a satisfactory decision. While we are informed that there are three claimants to this land, how can we decide that the Percifull claim is the better claim, when the other claimants are not represented before us, and have had no opportunity of proving to us that a decision ought not to be made in favor of Hale? We have no power to make other persons parties to this proceeding, and without that power, and without hearing all the parties interested before us, we cannot determine which of them is entitled to the land. A decision either in favor of, or against this claimant, must be made upon a partial view of the case, and we could not say, with any certainty, that any result we might reach would be one which would satisfy ourselves, or which ought to satisfy Congress.

The opinion of the Court, therefore, is, that we cannot decide this case, because we have not now before us the various parties who have an interest in the question, and because we have no power to make them parties to this proceeding.

35TH CONGRESS, }  
1st Session.

SENATE.

{ MIS. Doc.  
No. 97.

IN THE SENATE OF THE UNITED STATES.

MARCH 6, 1856.—Referred to the Committee on Claims.  
DECEMBER 18, 1857.—Referred to the Court of Claims.

The COURT OF CLAIMS submitted the following:



REPORT.

To the honorable the Senate and House of Representatives of the United States:

LOUIS G. THOMAS AND OTHERS vs. THE UNITED STATES.

The following papers in this case (no briefs filed) are respectfully submitted:

1. Petition of the claimants.
2. Letter from the State Department (copy.)
3. Opinion of the Court.

By order of the Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, on the day and year above written.

COURT OF CLAIMS,  
Washington, March 5, 1856.

SAM'L H. HUNTINGTON,  
Chief Clerk Court of Claims.

THE UNITED STATES COURT OF CLAIMS.

DISTRICT OF COLUMBIA, }  
Washington County. }

by the

Th, honorable the Judges of the Court of Claims:

by The petition of Louis G. Thomas, Edward K. Thomas, and Joseph Farmer, guardian of the children of Samuel W. Thomas, deceased, the legal representatives of Hartshorn R. Thomas, deceased, respectfully sheweth unto your honors that the government of the United States is justly indebted to them in the sum of \$11,732 44, in this:

The said Hartshorn R. Thomas, for a valuable consideration, did on or about the 16th day of January, 1822, purchase of one Jonathan Jenks a certain claim he held against the government of Spain, arising under the following facts, to wit: In the month of June, in the year 1812, the said Jonathan Jenks was the sole owner of the brig called the Jane, of Philadelphia, commanded by Peter Fosse, which vessel sailed from the port of Philadelphia on the 14th day of March, 1812, with a cargo composed of provisions and one hundred kegs of gunpowder, bound to Laguayra, where she arrived in safety on the 14th day of April following, and, from the distressed state of the country, her unlading was not completed until the 13th of July, same year. But in the meantime she had reloaded in part, and on the 21st of July the vessel was cleared out at the custom-house of Laguayra for Philadelphia. She was prevented from sailing by reason of an embargo laid by General Miranda, and on the first day of August the royal troops entered the said port.

Captain Fosse soon after received orders to send his sails on shore; and on the 19th of August he received further orders to proceed with the said brig to Puerto Cabello, where she was to stand a trial, and which said orders the said master was obliged to comply with; and on the 23d of September the said vessel and cargo were condemned (as well as several other American vessels in said port) by persons styling themselves judges of a court of admiralty of his Catholic Majesty.

From the said sentence Captain Fosse entered an appeal, and obtained a decree for the restitution of said vessel and cargo; but on proceeding to take possession of the brig, found her completely stripped, and the hull converted into a hulk, or prison-ship, and subject, on delivery to him, to very heavy costs. He then petitioned the commandant of marine to have her valued; and after a survey by competent persons, consisting of two master ship-carpenters and the boatswain of the squadron, she was pronounced (including her sails and rigging, which had been taken away) to be worth the sum of two thousand nine hundred and fifty-seven dollars, for which sum he petitioned payment, or the restoration of his vessel, as decreed, in the same state she was when condemned.

In answer to his said petition, the military commandant gave him orders to apply for payment to the marine commandant, who rejected the payment; and after repeated petitions, and being bandied about by the two said military commandants, he was at length obliged to abandon the vessel, and desist from further attempt to obtain payment or redress for said brig.

The part of the cargo belonging to the said Jonathan Jenk was found, on restitution, so deteriorated as to render an immediate sale indispensable, and was sold at a very heavy loss.

Captain Fosse, after expending a large sum of money in obtaining the best counsel, and his own expenses and that of his mate and crew during so long a period, and despairing of all success in obtaining justice, on the 15th July, 1813, came to the determination of returning to the United States, and place all the documents in relation to the vessel and cargo in the hands of his owner.

Your petitioners beg leave to submit the following statement of their claim :

Amount of vessel, as valued at Puerto Cabello, as per document marked B.....	\$2,957 00
Demurrage awarded by the American consul at Laguayra the same as in the case of the brig Cumberland, which vessel was also seized on the 1st August by the royal army.....	2,802 00
Amount of cost of coffee, on account of your memorialist, as per document marked C.....	1,230 90
Proportion of expenses in obtaining restitution of coffee, per said document C.....	18 75
	<hr/>
	7,008 65
Deduct amount of sales of said coffee in its deteriorated state, per same document marked C.....	481 25
	<hr/>
	6,527 40
Expenses of appeal, &c., endeavoring to recover the brig Jane, per document marked D.....	956 62
	<hr/>
	7,484 02
Interest from 21st July, 1812, (date of clearance of the brig Jane at Laguayra,) to the 7th January, 1822, is 9 years 5 months and 16 days, at 6 per cent. per annum..	4,248 42
	<hr/>
	11,732 44
	<hr/>

The said Jonathan Jenks was sole owner of the said vessel, and a citizen of the United States of America, as more fully appears by the register deposited in the custom-house for the district of Pennsylvania, in consequence of her not returning to the United States.

On the 8th day of January, 1822, Jonathan Jenks filed his memorial before the commissioners for adjudicating the claims of our citizens against Spain for spoliations, &c., appointed by virtue of the treaty of February 22, 1819, between the United States and Spain, demanding indemnity for the losses sustained by him in consequence of the seizure, detention, and final loss of his vessel and injury to her cargo by the Spanish authorities at Laguayra and Puerto Cabello. By the said treaty and commission the government of the United States fully released and discharged the government of Spain from any and all liability on account of this claim, which had been recognized as just by the government authorities at Laguayra, and by so doing the United States became liable to pay the same, and assumed the liability with the promise to pay.

On the 22d day of January, 1822, Jonathan Jenks filed a supplemental memorial, stating, among other things, that he had disposed of his claim for indemnity in the matter of the Jane and her cargo to Hartshorn R. Thomas, and that the right to the said claim was then vested in Mary Thomas, his widow, and her children.

The board of commissioners before which these memorials were filed

examined them and the testimony adduced in support of the claim on the 18th November, 1823, and came to the conclusion, and so ordered, that the said claim *be allowed as valid against Spain* for the value of the vessel, for the necessary expenses incurred in defending the property, and for the loss sustained upon the cargo; but on the 1st of May, 1824, the said commissioners rescinded their previous decision, on the plea that the evidence was "not sufficient to establish the claim under the treaty."

Your petitioners allege that the commissioners clearly erred in not allowing the said claim, and that, too, without fault on the part of the claimant or claimants, whereby the government of the United States became liable to claimants in the said sum of \$11,732 44, which said sum is now due, and unjustly detained from your petitioners.

Your petitioners would represent that on the 19th day of April, 1852, they memorialized the Congress of the United States for relief, and on the 26th day of January, 1854, the Committee on Claims in the House of Representatives made the report which is hereto annexed, and prayed to be taken as a part of this petition, accompanied by the following bill:

A BILL for the relief of Sarah K. Jenks and the legal representatives of Hartshorn R. Thomas, in the matter of the brig Jane.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury be, and he is hereby, authorized and required to pay, out of any moneys in the treasury not otherwise appropriated, the sum of two thousand five hundred and three dollars to Sarah K. Jenks, the widow of Jonathan Jenks, deceased, and the sum of two thousand one hundred and seventy-nine dollars, in equal parts, share and share alike, to the legal representatives of Hartshorn R. Thomas, deceased, namely: the sum of seven hundred and twenty-six dollars and thirty-four cents to Louis G. Thomas; the like sum of seven hundred and twenty-six dollars and thirty-three cents to Edward K. Thomas, and the like sum of seven hundred and twenty-six dollars and thirty-three cents to Joseph Shermer, guardian of the children of Samuel W. Thomas, deceased, amounting, in all, to the sum of four thousand six hundred and eighty-two dollars, the said payments to be a discharge in full for all liability of the United States for the loss of the brig Jane and her cargo, seized and destroyed by the Spanish authorities at Lagunayra in the year eighteen hundred and twelve.

On the 22d day of July the said bill was debated and laid upon the table.

Your petitioners represent that they are the sole legal representatives of the said Hartshorn R. Thomas and Mary Thomas, both deceased, and as such are the sole owners of the said claim.

After due investigation and consideration in the premises, your petitioners pray your honorable Court to frame and report to Congress a bill for their relief, appropriating to petitioners the said sum of \$11,732 44. And, as in duty bound, your petitioners will ever pray.

SNETHEN & EVANS,

*Attorneys for Claimants.*

I, Louis G. Thomas, do solemnly swear that the facts as set forth in the foregoing petition are just and true, to the best of my knowledge and belief, so help me God.

LOUIS G. THOMAS.

Sworn to and subscribed before me, the undersigned authority, on this 18th day of July, 1855.

THOS. DONOHO, *J. P.*

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COURT OF CLAIMS.

LOUIS G. THOMAS AND OTHERS *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court, which is as follows :

This claim is founded on an alleged illegal seizure at Laguayra, by the Spanish authorities, in 1812, of the brig *Jane*, and on the treaty of 1819, between the United States and Spain.

The Court considering the decision of the board of commissioners mentioned in the petition to be a very important feature in the case, made a request to the Secretary of State for information on the subject. The information furnished by the department relative to the decision of the board will be hereinafter noticed.

The only question in this case which we have found it necessary to examine is, whether the final decision of the board of commissioners (which decision is described in the petition) is a bar to the claim ?

Previously to the treaty of the 22d of February, 1819, between the United States and Spain, which we shall presently notice more particularly, this claim for redress for the alleged illegal seizure and condemnation of the said brig by the Spanish authorities in South America could only have been preferred against the nation that had committed the injury, which nation was Spain, not the United States. Accordingly, we find that, in 1813 and 1814, the captain of the brig endeavored, at Laguayra, to obtain satisfaction from the Spanish authorities. But his endeavors being unsuccessful, he abandoned the pursuit, and returned to the United States. Nothing further appears to have been done as to the claim until after said treaty of 1819 between the United States and Spain, for the cession of the Floridas. By the 9th article of that treaty, all such claims of citizens of the United States against Spain as the claim described in the petition before us were renounced by the United States. The 11th article of said treaty, so far as it need be stated, is as follows: "The United States, exonerating Spain from all demands in future on account of the claims of their citizens, to which the renunciations herein contained extend, and considering them entirely cancelled, undertake to make satisfaction for the same to an amount not exceeding five millions of dollars. To ascertain the full amount and validity of those claims a commission, to consist of three commissioners, citizens of the United States, shall be appointed by the President, by and with the advice and consent of the Senate,



which commission shall meet at the city of Washington, and within the space of three years from the time of their first meeting shall receive, examine, and decide upon the amount and validity of all the claims included within the descriptions above mentioned. The said commissioners shall take an oath or affirmation, to be entered on the record of their proceedings, for the faithful and diligent discharge of their duties; and, in case of the death, sickness, or necessary absence of any such commissioner, his place may be supplied by the appointment as aforesaid, or by the President of the United States, during the recess of the Senate, of another commissioner in his stead. The said commissioners shall be authorized to hear and examine, on oath, every question relative to the said claims, and to receive all suitable authentic testimony concerning the same. And the Spanish government shall furnish all such documents and elucidations as may be in their possession, for the adjustment of the said claims according to the principles of justice, the laws of nations, and the stipulations of the treaty between the two parties, of 27th October, 1795; the said documents to be specified, when demanded, at the instance of the said commissioners."—(8 Stat. at Large, 260.)

The commissioners, whose appointment was thus provided for, were afterwards appointed in conformity with the treaty; and in June, 1821, the board was organized in the city of Washington. In January, 1822, according to the petition, the said Jonathan Jenks, the original owner of the claim, filed his memorial before said commissioners, demanding indemnity for the losses sustained by him in consequence of the seizure, detention, and final loss of his vessel, and injury to her cargo, by the Spanish authorities at Lagunayra and Puerto Cabello. The petition further states that the board of commissioners before which these memorials were filed "examined them, and the testimony adduced in support of the claim, on the 18th of November, 1823, and came to the conclusion, and so ordered, that the said claim be allowed as valid against Spain for the value of the vessel, for the necessary expenses incurred in defending the property, and for the loss sustained upon the cargo; but on the first of May, 1824, the said commissioners rescinded their previous decision, on the plea that the evidence was not sufficient to establish the claim under the treaty." That is the language of the petition relative to the decision of the commissioners. The statement on the subject, to which we have referred, received from the State Department, is as follows: "The record of the proceedings of the commissioners under the convention with Spain of 1819 has been examined, and it appears that the claim of Jonathan Jenks, growing out of the capture of the brig *Jane*, was duly presented to the board of commissioners, and was disallowed." This statement from the department, after mentioning a decision of the board in another case, and also the decision of another board, says: "The evidence of these decisions is derived from the minutes on the dockets of the several boards of commissioners; but no document can be found, in either case, stating the principle on which the decision was made."

The objection of the petitioners to said decision of the board of commissioners against the claim is set out in the petition, and is as follows:

"Your petitioners allege that the commissioners clearly erred in not allowing the said claim, and that, too, without fault on the part of the claimant or claimants, whereby the government of the United States became liable to the claimants in the said sum of \$11,782 44, which sum is now due and unjustly detained from the petitioners."

The ground thus taken to avoid the decision of the board of commissioners is not tenable. The question whether the board erred or not, in their judgment in the case, is not for this Court, or any other court, to determine. The decision of the board must be taken to be correct. The circumstance stated in the petition, that the board had, in the first instance, made an order in favor of the claim, is unimportant. The case remained, after that order, under the control of the board, to be finally disposed of as, upon further reflection or information, they might think proper.

The final decision of the board against the claim was rendered by a tribunal specially provided for by the treaty for the adjudication of such claims, to which tribunal the original claimant had submitted the case for decision, and from which decision there is no appeal given to any other tribunal. The judgment of the board stands upon the same ground with the judgment of any judicial tribunal of exclusive jurisdiction.

The nature and effect of a judgment of this same board of commissioners, under the same treaty with Spain of 1819, have been examined and settled by the Supreme Court of the United States. Judge Story, in delivering the opinion of the court, uses the following language: "The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the *amount* and *validity* of the asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review in any judicial tribunal; an amount once fixed is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty."—(*Comegys vs. Vasse*, 1 Peters' Rep., 193, 212.)

We are of opinion, for the reasons above given, and upon the authority cited, that said final decision of the board of commissioners, disallowing the claim now before us, is a complete bar to the present demand.



IN THE SENATE OF THE UNITED STATES.

MAY 12, 1856.—Read and referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

J. D. HOLMAN, EXECUTOR, *vs.* THE UNITED STATES.

1. The petition of the claimant to the Court of Claims.
2. Petition to Congress, with accompanying documents, referred to the Court of Claims by the House of Representatives, and returned to that House.
3. Two original letters, exhibited as evidence in the case, and transmitted to the House of Representatives.
4. Petition for rehearing by claimant.
5. Claimant's brief.
6. Opinion of the Court on both hearings.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of May, [REAL.] A. D. 1856.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

J. D. HOLMAN, executor of JESSE B. HOLMAN, deceased, *vs.* THE UNITED STATES.

*To the honorable the Judges of the Court of Claims:*

Your petitioner, J. D. Holman, respectfully represents, that his brother, Jesse B. Holman, died in the State of Alabama, in the year 1853, and that letters of administration, with the will annexed, upon

his estate have been granted your petitioner by the judge of probate for Marengo county, in said State.

Your petitioner further shows, that the Hon. Bailie Peyton, late envoy extraordinary and minister plenipotentiary of the United States to Chili, was officially recognized by the latter government on the 16th day of February, 1850 ; that Robert M. Walsh was appointed his secretary of legation, who subsequently declined, and B. Rowan Hardin appointed in his place ; that the said Hardin never reached his post, but died, as your petitioner is informed and believes, at Panama, on his way to Chili, on the 24th of June, 1850 ; that the said Jesse B. Holman was commissioned to this position, and that upon his arrival at his post he found a very large accumulation of business in the office of the legation, in consequence of the long absence of the proper officer whose duty it was to discharge it ; that the office was otherwise much out of order, there being no index to the records, in consequence of which there was much difficulty and confusion in managing the business of the legation ; that the said Jesse entered zealously into the labor, which was of a very onerous character, in arranging the papers and records of the office, and making the necessary indexes therefor ; that he succeeded in bringing up the business that was in arrear, by instituting a perfect arrangement of the records and papers, and completing indexes for the business transacted under Mr. Peyton's and his predecessor, Mr. Barton's, administration, and for a very large portion of the ancient records of the office, though he was prevented from finally completing the indexes by failing health and necessary attention to the current business of his office ; that a petition, praying compensation for these services, was presented to the Senate of the United States during the last Congress, which being referred to the Committee on Foreign Affairs, the said committee reported, July 28, 1854, a bill for his relief, No. 477, allowing the said Jesse the sum of seven hundred and sixteen dollars and sixty-seven cents, " for extra clerical duties, from the 16th of February to the 24th of June, 1850." That this report and bill having been passed by the Senate, was sent to the House of Representatives, and laid on the Speaker's table, where, from want of time, it was not acted on ; all of which will appear by reference to the papers in said case, now filed in this honorable Court by virtue of the resolution of the House of Representatives, which reference gives, under the act, jurisdiction of this case to your honorable Court.

Your petitioner therefore prays that the said amount be adjudged and decreed to be paid to him, and that the necessary proceedings be had for that purpose.

P. PHILLIPS,  
*Solicitor for J. D. Holman, Adm'r.*

Personally appeared ——— before me ———, who, being duly sworn, says that the facts set forth in the above petition are true, to the best of his knowledge.

J. D. HOLMAN, executor of JESSE B. HOLMAN, deceased, *vs.* THE UNITED STATES.

The claim for extra compensation as secretary of legation to Chili rests upon the performance of services which should have been rendered by two former secretaries, one of whom had died, and the other resigned. This claim is sustained by the practice of the government, and its payment recommended by the minister plenipotentiary and Secretary of State.—(See letters of Mr. Peyton and Mr. Marcy, on file.)

The Committee on Foreign Relations, Senate, made a report, No. 375, to accompany bill No. 477, on 28th July, 1854. The bill passed the Senate, and was sent to the House, and without being acted on was referred to this Court.—(See report and bill, on file.)

The facts are all ascertained, and there would seem to be no necessity why the Court should not now decide upon it without transferring it to the judicial docket.

P. PHILLIPS,  
*Solicitor for Petitioner.*

OCTOBER 5, 1855.

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HOLMAN, administrator, with the will annexed, *vs.* THE UNITED STATES.

Opinion of the Court delivered by BLACKFORD, J.

The petition is attached to this opinion. It is alleged that the testator, Jesse B. Holman, was commissioned subsequently to the 24th of June, 1850, secretary of legation to Chili; that, upon his arrival at his post, he found a very large accumulation of business in the office of the legation, in consequence of the long absence of the proper officer whose duty it was to discharge it; that the office was otherwise much out of order, there being no index to the records, in consequence of which there was much difficulty and confusion in managing the business of the legation; that the said Jesse entered zealously into the labor, which was of a very onerous character, in arranging the papers and records of the office, and making the necessary indexes therefor; that he succeeded in bringing up the business that was in arrear, by instituting a perfect arrangement of the records and papers, and completing indexes for the business transacted under Mr. Peyton's, and his predecessor, Mr. Barton's, administration, and for a very large portion of the ancient records of the office, though he was prevented from finally completing the indexes by failing health and necessary attention to the current business of his office.

The petitioner, for the above extra services, claims from the government the sum of seven hundred and fifty dollars.

The testator was a public officer with a regular salary.

There is an act of Congress of the 23d of August, 1842, as follows:

"Sec. 2. *And be it further enacted*, That no officer in any branch of the public service, or any other person whose salary, pay, or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatsoever, unless the same shall be authorized by law, and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance or compensation."—(5 Stat. at Large, 510.)

This statute applies to the case before the Court.

The claimant has no demand against the government that can be sustained by this Court for the extra services stated in the petition.

No order for testimony will be made in this case.

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After the foregoing opinion was delivered, the claimant filed a petition for a modification of the decision, or for leave to argue the question relative to the jurisdiction of the Court. The leave asked for was granted, and the argument heard.

Our former opinion in this case is founded on an act of Congress of 1842, which is copied in that opinion. The claimant contends that that act applies only to the different departments of the government; but we do not agree with him. The language of the act is general, and we have no authority to limit its operation. We therefore adhere to our former decision against the claim.

The case, however, having been referred to this Court by the House of Representatives, we have, on the motion of the claimant, examined the papers referred. The testimony consists of two letters—one from the American minister at Chili, Mr. Peyton, to the testator, dated May 24, 1853, and the other from the Secretary of State, Mr. Marcy, to the chairman of the Committee on Foreign Affairs of the House of Representatives, dated February 9, 1854. There are also among the papers referred from the House a report of the Committee on Foreign Relations of the Senate, dated July 28, 1854, in favor of the claim, and a bill, which accompanied the report, allowing the testator seven hundred and sixteen dollars and sixty-seven cents for the extra services mentioned in the bill. On the 9th of February, 1855, the bill passed the Senate, and was sent to the House of Representatives for concurrence. On the 3d of March, 1855, the case was referred by the House of Representatives to this Court.

The two letters aforesaid are the only evidence. The originals are returned to the House of Representatives.

The claimant has no legal claim, and must depend upon the discretion of Congress.

IN THE SENATE OF THE UNITED STATES.

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JUNE 27, 1856.—Read and referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

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The COURT OF CLAIMS submitted the following

**REPORT.**

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

SUSAN DECATUR *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Brief of the Solicitor.
3. Opinion of the Court, refusing an order to take testimony, delivered by Chief Justice Gilchrist.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this twenty-fifth day of  
[L. s] June, A. D. 1856.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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IN THE UNITED STATES COURT OF CLAIMS.

*To the honorable the Judges of the Court of Claims:*

The petition of Susan Decatur, widow of the late Commodore Stephen Decatur, in behalf of herself and others, the legal representatives of the captors of the frigate Philadelphia, respectfully sheweth:

That during the war between the United States and Tripoli, the



United States frigate Philadelphia, commanded by Commodore Bainbridge, belonging to the squadron which had been ordered to the Barbary coast, was stranded on rocks, and in that situation was captured by the enemy. That the frigate was afterwards got off, without material damage, and taken into the Tripolitan service, manned and got ready for sea, and was moored in the harbor of Tripoli, within pistol-shot of the Tripolitan marine of upwards of one hundred pieces of heavy cannon, and land batteries of one hundred and fifteen pieces of heavy artillery. That by the loss of the Philadelphia the force of Commodore Preble's squadron was so much reduced that hostilities could not be prosecuted on a scale at all commensurate with the service to be performed; and that in this conjuncture Stephen Decatur, the husband of your petitioner, then a lieutenant commanding the schooner Enterprise, conceived and proposed the idea of entering the harbor of Tripoli by night, and of boarding and re-capturing the Philadelphia, and volunteered his service to execute the plan; that after deliberation his offer was accepted, and the enterprise was executed in a manner which has received the undivided admiration of all who have since read the recital of this exploit. That in view of the hazards to which this undertaking was exposed, and the necessity of secrecy and celerity in its execution, Commodore Preble gave a peremptory order to Lieutenant Decatur not to attempt to bring the frigate out of the harbor, but, in case of success, to be sure to set fire to the gun-room, berths, cockpit, store-rooms, &c., and then, after blowing out her bottom, to abandon her. That Lieutenant Decatur could have safely brought the frigate out of the harbor, but did not, in consequence of the peremptory order aforesaid of Commodore Preble.

And your petitioner alleges that, by virtue of the act of Congress of April 23, 1800, (2 Stat. at Large, p. 52,) the captors of the Philadelphia were entitled to the proceeds thereof as prize of war; and that, the vessel having been destroyed by the peremptory order of the commander of the squadron, they are entitled to the value of said vessel from the United States, by whose officer and for whose benefit such order was given.

That your petitioner is the sole owner of so much of said claim as she would be entitled to as the widow of the late Stephen Decatur; that she has heretofore presented this claim to Congress, and its action, so far as she is informed, has been as follows: In the 18th, 19th, 20th, 21st, 22d, 23d, 24th, 30th, 31st, 32d, and 33d Congresses, favorable reports have been made, and no adverse report has been made. In the 19th, 20th, 23d, and 30th Congresses, the bill for your petitioner's relief was laid on the table in the House. It has five times passed the Senate.

And your petitioner will ever pray, &c.

SUSAN DECATUR.

A. H. LAWRENCE,  
*Attorney for Petitioner.*

DISTRICT OF COLUMBIA, }  
 Washington County, } ss.

On this twenty-eighth day of June, A. D. 1855, personally appeared before me, Lewis Carbery, a justice of the peace in and for said county, Susan Decatur, and made oath that the facts stated in the foregoing petition are true, to the best of her knowledge and belief.

LEWIS CARBERY,  
*Justice of the Peace.*

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COURT OF CLAIMS.—No. 26.

ON PETITION OF SUSAN DECATUR.

*Brief of the Solicitor.*

The claim is founded on the act of Congress of 23d of April, 1800, §5, 2d vol., p. 52, declaring "that *the proceeds* of all ships and vessels, and the goods taken on board of them, *which shall be adjudged good prize*, shall, when of equal or superior force to the vessel or vessels making the capture, be the sole property of the captors; and when of inferior force, shall be equally divided between the United States and the officers and men making the capture."

It is not stated that Decatur either captured the Philadelphia, for which his wife asks compensation as for a prize, or that the vessel was adjudged good prize, but that, acting under Preble's orders, he destroyed the vessel in the harbor of Tripoli, and that he might have captured it if he had been ordered to do so.

If such a claim is maintainable, why may not a claim be maintained for every vessel destroyed during the war?

The fact that the party got on board the vessel was accidental and immaterial. The party went out on purpose to destroy the vessel, and got on board of it only to effectuate that object. Such captures are not within either the letter or spirit of the prize act, which refers only to what is taken and brought away, not to things taken and destroyed at the same time.

2. The questions of law pressed by the claimants have, therefore, no bearing whatever on the case. But if they had, it is only maintained that capture vests property in the captors against all the world *save* against the government; so that if there had been a capture in any proper sense, how does the argument advance the claim, seeing that it is admitted there is no property thereby vested, except against persons and parties who are not parties here, whereas against the United States, the party here, it passes no title whatever by the laws of war?

3. The property then is in the sovereign. The right of the captor is nothing more than a right to hold it for the sovereign, to be disposed of according to the will of the government; and property as against the government is only to be acquired in accordance with the

prize law ; or in other words, that whether there be anything due to claimants depends upon their bringing themselves within the provisions of the act providing for the distributing the prize. This point is expressly decided in the 10th Wheaton, p. 310, in the case of the "Dos Hermanos."

4. It is not pretended here that the act which alone gives any interest has been complied with. So no interest is vested by the capture.—(See the case of the *Dos Hermanos*, above cited.) All the questions are ably discussed in the 1st vol. reports of the 2d session 19th Congress, Report No. 74, by Mr. Storrs, one of the first legal minds in the country.

5. But it is generally argued, that as Commodore Preble, acting for the United States, ordered the destruction of the vessel, Decatur was thereby prevented from bringing the vessel to condemnation, the United States are precluded from availing themselves of the failure to comply with the law.

If this reasoning be good, what will prevent the government from being liable for prizes which any subordinate and his comrades may have thought they could have made *if they had been permitted by their superiors*? Are we now to supervise Commodore Preble's directions in his command, and say here now that he erred?

6. No claim for *what might* have been done can be maintained. It may be supposed with good reason that much more might have been done than was done, and that Commodore Preble erred very much in not ordering more; but as he was the lawful commander of the United States forces, it is very illogical to base a legal claim upon the hypothesis that he ought to have given a different order.

M. BLAIR.

#### SUSAN DECATUR *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court :

The claimant states the following case :

During the war between the United States and Tripoli the frigate *Philadelphia* was stranded on the rocks on the Barbary coast, and in that situation was captured by the enemy. She was got off the rocks, manned, and made ready for sea by the Tripolitans, and moored in the harbor within pistol-shot of numerous batteries of heavy artillery. Lieutenant Decatur, the husband of the claimant, then commanding the schooner *Enterprise*, volunteered to board and recapture the *Philadelphia*. His offer was accepted ; but in view of the hazards to which the undertaking was exposed, and the necessity of secrecy and celerity in the execution, Commodore Preble gave him a peremptory order not to attempt to bring the frigate out of the harbor, but in case of success, to be sure to set fire to the gun-room, berths, cock-pit store-rooms, &c., and then, after blowing out her bottom, to abandon her. Lieutenant Decatur, it is alleged, could have safely brought the frigate out of the harbor, but did not do so on account of the peremptory order of Commodore Preble. He succeeded in performing his duty and de-

stroying the frigate in a manner which received and entitled him to the admiration and applause of his country.

It is very evident from this statement that Lieutenant Decatur did not *capture* the Philadelphia in a sense which entitled him to her proceeds or value as prize of war, within the meaning of the act of the 23d of April, 1800. The duty which he so gallantly performed was that of her destruction, and not of her capture. His peremptory orders were to set her on fire, and, after blowing out her bottom, to abandon her. These orders were inconsistent with the idea of a capture. He was to retain possession of her only so long as was necessary to enable him to take the proper measures for her destruction. His orders were not only to destroy her, but they were so precise as to exclude the conclusion that he was to capture her. The object of the expedition was to destroy the frigate. In order to effect this object, it was necessary to obtain possession of her. But this possession was merely incidental, and was only one of the means to be adopted to effect the main purpose. It was not intended to obtain the possession for the purpose of bringing the frigate into port, and of obtaining a decree of condemnation, but for the mere purpose of her destruction. After the possession was obtained, she might or might not have been safely brought out of the harbor of Tripoli. That is a mere speculation as to probabilities. But the question before us is not whether she might have been captured, in a legal sense, but whether she was actually captured within the meaning of the law. The question is whether this claim is in the nature of the legal right secured by the prize act. It is not to be determined by the law of nations, but by the true intent and meaning of the acts of Congress.

The 5th section of the act of April, 1800, (2 St., 52,) provides that "the proceeds of all ships and vessels, and the goods taken on board of them, which shall be adjudged good prize," \* \* \* shall be the property of the captors. This is substantially a provision that the vessel is to be condemned, and that there is to be a legal adjudication that she is good prize, before the proceeds are to become the property of the captors. A sale of the captors does not divest the court of admiralty of its jurisdiction. In the case of *Williams vs. Armroyd*, (7 Cranch, 423,) it was held that a sale before condemnation by one acting under the possession of the captor does not divest the court of jurisdiction, and the condemnation relates back to the capture, affirms its legality, and establishes the title of the purchaser. In the case of the *Mary Ford*, (3 Dall., 188,) it was held that immediately on a capture, the captors acquired such a right as no neutral nation could justly impugn or destroy, but it is not intimated that they acquired an absolute right. Property captured in war belongs, in the first instance, to the nation. The *Dos Hermanos*, (10 Wheaton, 310.) Whatever right the captors acquire is derived by grant. In the case of the *Sally*, (8 Cranch, 382,) it was held that the prize act of June 26, 1812, operated as a grant from the United States to the captors of all property rightfully captured by commissioned privateers as prize of war. This shows that the mere taking possession of the property does not, of itself, vest the title to it in the captors. As the title depends on a grant, it must conform to the conditions of the grant. These condi-

tions are that the vessel, after having been captured, shall be brought into port and condemned as lawful prize. In the case of *Jecker vs. Montgomery*, (13 Howard, 515,) Mr. Chief Justice Taney says: "As a general rule it is the duty of the captor to bring it within the jurisdiction of a prize court of the nation to which he belongs, and to institute proceedings to have it condemned."

But, as we have before said, the question is whether the Philadelphia was *captured* in the legal sense of the word. In the case of the *Grotius*, (9 Cranch, 368,) it was held that in order to constitute a capture, some act should be done indicative of an intention to seize and retain as prize; it is sufficient if such intention is fairly to be inferred from the conduct of the captor. In this case there is nothing from which such an intention can be inferred. The orders given and the acts done show that the sole object in taking possession of the frigate was to destroy her. The claimants have the same rights as, and no other rights than, other officers and men acquire, by the destruction of an enemy's property in war by the orders of their commanding officers, and it was never supposed that such a destruction of property was the foundation of a legal right.

While our opinion is, that the claimants have no legal cause of action against the United States which can be enforced in this court, we of course shall not be understood as wishing to detract from the merit of the gallant men who accomplished this enterprise, or to pluck a single leaf from their laurels. This feat of arms was performed under circumstances of peculiar difficulty and danger, with consummate skill, at night, in the face of powerful batteries, and with the most perfect self-possession and courage. By a vigorous and well organized attack the enemy were suddenly deprived of the efficient means of resistance which the possession of the frigate would have afforded to our operations. The achievement has never been forgotten. It has always been regarded as one of the most brilliant of our naval successes. The case commends itself to the far-sighted liberality of Congress, by the fact that the most effective mode of insuring a spirit of devotion and self-sacrifice in naval and military operations, is to recognize the gallantry of the actors in them by such rewards as may stimulate the exertions of others. But such considerations are to be weighed by Congress, and not by this Court. Our duty is performed by expressing our opinion on the case in its legal aspects, and that opinion is, that however strong the claims of the petitioner may be upon Congress, they have no legal cause of action against the United States.





IN THE SENATE OF THE UNITED STATES.

JANUARY 19, 1857.—Read and referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

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The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

J. BOYD *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Amended petition.
3. Documents referred by the House of Representatives to the Court of Claims and returned to that House.
4. Opinion of the Court refusing an order to take testimony.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this nineteenth day of January, A. D. 1857.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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*Claim—No. 1.*

*To the Court of Claims:*

The petition of the undersigned respectfully represents, that he was appointed assistant marshal on the eleventh day of June, 1850, to take the seventh census of the parish of Iberville, in the State of Louisiana. A few days after his appointment two crevasses took place at the Mississippi river, which caused three-fourths of the lands in said parish to be overflowed by water, from two to six feet deep. In consequence of this unforeseen and destructive calamity, he was obliged to hire two men and board them fifty-five days at \$2 50 per day. Also hired boat at fifty cents per day; both amount to \$275, and my own additional labor and expense, \$100, making in all \$375. The only method of travelling to and from the dwelling houses was in boats.

This claim passed the Senate, January 4, 1853, allowing me \$275.—(See Senate Bill No. 86, as annexed.)



*Claim—No. 2.*

Your petitioner respectfully asks the honorable Court to pay the amount of the following bill :

WASHINGTON, D. C., *December 28, 1855.*

TREASURY DEPARTMENT, 4th AUDITOR'S OFFICE,

To J. BOYD.

For services rendered as a clerk in said office, from May 23, 1853, to June 30, inclusive, thirty-nine days, at \$3 33½ per day.....	\$130 00
Add 20 per cent., as per act of Congress passed 17th July, 1851, allowing the clerks per centage upon the amount of their salaries.....	26 00
	<hr/>
	156 00
	<hr/>

A certificate given by Mr. Dayton, 4th Auditor, stating the service rendered, and the amount due on the above claim, No. 2, are now in the hands of the Clerk of the House of Representatives of the United States of America.

This claim was referred to the Committee on Claims in the lower House, but never was acted upon. He respectfully asks the Court to allow the above claims, \$531, with interest.

J. BOYD, of *Louisiana.*

DISTRICT OF COLUMBIA,

*Washington County, to wit :*

On this 16th day of June, in the year of our Lord one thousand eight hundred and fifty-five, before me, the subscriber, a justice of the peace in and for the county and District aforesaid, personally appeared J. Boyd, and made oath in due form of law that the foregoing and annexed statement of accounts, marked No. 1 and 2, and just and true as therein stated, and that he hath not directly or indirectly received any part or parcel of the said claims or either of them, or other satisfaction, to the best of his knowledge and belief.

Sworn before me.

J. H. GODDARD, J. P.

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COURT OF CLAIMS.

*Amendment of the original petition.*

JEREMIAH BOYD *vs.* THE UNITED STATES.

*To the honorable Judges of the Court of Claims:*

*Claim No. 1.* Your petitioner, Jeremiah Boyd, is the sole owner and only person interested in said claim. This claim was referred to this honorable Court by resolution of the House of Representatives of 3d March, 1855.

*Claim No. 2.* This claim is for services shown to have been rendered by your petitioner by the following copy of a certificate given by Mr. A. O. Dayton, Fourth Auditor of the Treasury of the United States, to wit:

FOURTH AUDITOR'S OFFICE,  
January 5, 1854.

"I hereby state that in May last Mr. J. Boyd proposed to me to render temporary clerical services in the office, and that I informed him that I had not the means of paying him, but that if he chose to render the services and rely for his compensation upon an application to Congress, I had no objection. Upon these terms he came into the office and served thirty-seven days, viz: from the 23d of May to the 30th of June, excluding two days during which he was absent.

A. O. DAYTON."

If your petitioner had rendered such services under and by virtue of a regular appointment and qualification thereto and therefor, he would have been entitled by the laws of the United States to demand and receive of and from the government of the United States, the sum of three dollars and thirty-three and a third cents per day therefor, making - - - - - \$123 33 $\frac{1}{3}$

And 20 per cent. thereon by act of Congress, approved August 31, 1852, cl. 108, section 2, Statutes at Large vol.

10, p. 97 - - - - - 24 66

147 99 $\frac{1}{3}$

Your petitioner is the sole owner and only person interested in said claim.

And your petitioner being remediless save in and through your honorable Court, where such matters are properly cognizable and relievable, prays your honors to examine the matters and things herein set forth, and report a bill to Congress, which, if adopted, will secure to him the payment of \$375 with interest thereon from the year 1850, until paid; and the sum of \$147 99 $\frac{1}{3}$  with interest thereon from the year 1853, until paid; and your petitioner, as in duty, &c.

J. BOYD.

COUNTY OF WASHINGTON, }  
District of Columbia, } ss.

On this 29th day of November, A. D. 1855, before me, J. H. Goddard, justice of the peace in and for the county aforesaid, personally appears the above named Jeremiah Boyd and makes oath on the Holy Evangelical of Almighty God, that the facts set forth in the foregoing amendment of petition are true, according to the best of his knowledge and belief.

J. H. GODDARD, J. P.

M. THOMPSON,  
Of Counsel for Petitioner.

J. BOYD *vs.* THE UNITED STATES.

The opinion of the Court was delivered by Judge SCARBURGH.

The petition in this case sets forth two claims :

*Claim 1.* The first claim is stated as follows : " The petition of the undersigned respectfully represents that he was appointed assistant marshal on the 11th day of June, 1850, to take the seventh census of the parish of Iberville, in the State of Louisiana. A few days after his appointment two crevasses took place at the Mississippi river, which caused three-fourths of the lands in said parish to be overflowed by water, from two to six feet deep. In consequence of this unforeseen and destructive calamity, he was obliged to hire two men and board them fifty-five days, at \$2 50 per day. Also hired a boat at fifty cents per day ; both amount to \$275, and my own additional labor and expense, \$100, making in all \$375. The only method of travelling to and from the dwelling houses was in boats.

" This claim passed the Senate January 4, 1853, allowing me \$275.—(See Senate bill No. 86, as annexed.)"

On the 3d day of March, A. D. 1855, this claim was referred to this Court by a resolution of the House of Representatives.

*Claim 2.* This claim consists of two items : The first is for clerical services rendered in the Fourth Auditor's Office in the Treasury Department, from the 23d day of May till the 30th day of June, A. D. 1853, inclusive—thirty-nine days, at \$3 33 $\frac{1}{3}$  per day, \$130 ; and the second, as stated in the petition, is " for twenty per cent., as per act of Congress passed 17th July, 1851, allowing the clerks per centage upon the amount of their salaries," \$26.

This claim arose as follows : In May, A. D. 1853, the petitioner proposed to A. O. Dayton, the Fourth Auditor, to render temporary clerical services in his office. The latter informed him that he had not the means of paying him, but that if he chose to render the services, and rely for his compensation upon an application to Congress, he (the Auditor) had no objection. Upon those terms the petitioner went into the office, and served thirty-seven days, viz : from the 23d day of May to the 30th day of June, A. D. 1853, excluding two days during which he was absent.

As to the first claim, the fourth section of the act of May 23, A. D. 1850, is as follows : " That each marshal shall appoint an assistant for each subdivision, who is a resident therein, to whom he shall give a commission under his hand, authorizing him to perform the duties herein assigned to assistants, which commission shall set forth the boundaries of the subdivision, of which appointment so made, and the boundaries so specified, the marshal shall keep a true and faithful record."—(9 Stat. at Large, p. 428-9.)

The twelfth and thirteenth sections of that act are as follows :

" SEC. 12. That each assistant shall be allowed, as compensation for his services, after the rate of two cents for each person enumerated, and ten cents a mile for necessary travel, to be ascertained by multiplying the square root of the number of dwelling houses in the division, by the square root of the number of square miles in each division,

and the product shall be taken as the number of miles travelled for all purposes in taking this census.

"SEC. 13. That, in addition to the compensation allowed for the enumeration of the inhabitants, there shall be paid for each farm, fully returned, ten cents; for each establishment of productive industry, fully taken and returned, fifteen cents; for the social statistics, two per cent. upon the amount allowed for the enumeration of population; and for each name of a deceased person returned, two cents: *Provided, however,* That, in making returns of farms and establishments of productive industry, the instructions given by the Secretary of the Interior must be strictly observed, and no allowance shall be made for any return not authorized by such instructions, or for any returns not limited to the year next preceding the first of June next."

The fourteenth section of that act provides, "that any assistant who, having accepted the appointment, shall, without justifiable cause, neglect or refuse to perform the duties enjoined on him by this act, shall be guilty of a misdemeanor, and, upon conviction, be liable to a forfeiture of five hundred dollars."—(9 Stat. at Large, pp. 430, 431.)

This is the whole statute law applicable to this claim. The petitioner, in accepting the office of assistant marshal, could have done so only on the terms which the law prescribes. He thereby undertook to perform the duties of his office for the compensation allowed by law, and exposed himself to its penalty, if without justifiable cause he should neglect or refuse to perform those duties. If the disaster, which so much increased his labors, and enhanced the incidental expenses of the performance of his duties, amounted to a justifiable cause for his neglecting or refusing to perform them, then he might, with impunity, have neglected or refused to perform them. But if, notwithstanding this untoward event, he preferred fully to discharge his duties, he must intended to have done so on the terms prescribed by law. At least, his having adopted this course, and in good faith discharged his duties under the disadvantageous circumstances which embarrassed him, however much it may redound to his credit and honor as a public officer, still creates no legal liability on the part of the United States to increase his compensation, or to reimburse him the additional incidental expenses to which he was subjected. The law prescribed both his duties and the compensation to be allowed for their performance, and he can have no legal demand beyond the terms of the law.

The petitioner's claim is certainly not founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States. It was, however, referred to this Court by the House of Representatives. Still we know of no principle, either of law or equity, upon which this claim can be raised to the dignity of a legal demand against the United States.

We are, therefore, of the opinion, that the facts set forth in the petition of the claimant in relation to this claim do not furnish any ground for relief, and are constrained to refuse an order directing the taking of testimony in regard to it.

If, however, Congress should take a different view of this claim, or be of the opinion that, notwithstanding the petitioner has no legal demand against the United States on account of it, still, under the circumstances on which it is founded, right cannot be done without an increase of his compensation, then the bill which passed the Senate, and is a part of the record in this case, will be before them, to be disposed of as they in their wisdom may deem expedient. But there is no evidence before us that the petitioner's allegations are true.

As to the second claim, the fifteenth section of the act of Congress of August 26, A. D. 1842, is as follows: "That no extra clerk shall be employed in any department, bureau, or office, at the seat of government, except during the session of Congress, or when indispensably necessary to enable such department, bureau, or office to answer some call made by either House of Congress at one session, to be answered at another; and not then, except by order of the head of the department in which, or in some bureau or office of which such extra clerk shall be employed, and no such extra clerk, for copying, shall receive more than three dollars per day, or for any other service more than four dollars per day, for the time actually and necessarily employed."—(5 Stat. at Large, p. 526.)

The services rendered by the petitioner were performed during the recess of Congress, and it is not pretended that they were indispensably necessary to enable the Fourth Auditor's office to answer a call made by either House of Congress at one session to be answered at another. And so far from his having been employed by order of the head of the Treasury Department, he voluntarily tendered his services, and was merely permitted by the Fourth Auditor to perform them in his office. If this is to be considered as an employment in the sense of the statute, then it was a direct violation of the statute, and for that reason no legal liability on the part of the United States, to make the petitioner compensation for his services, can result from it. If it was not such an employment, then what was it? At most but a voluntary service rendered to the United States, under circumstances which directly show that whether it was to be paid for or not should depend upon the mere grace and favor of Congress; for the petitioner was expressly told that "if he chose to render the services and rely for his compensation upon an application to Congress," the Fourth Auditor had no objection. There was certainly no express contract on the part of the United States to compensate the petitioner for these services, and the circumstances under which they were rendered not only do not raise an implied contract to that effect, but they actually repel such an implication. This would be the correct view of such a case between man and man, according to the principles of the common law. But this claim cannot be considered as wholly unaffected by the act of 1842. To sustain it would be to sustain an evasion and consequent virtual violation of that act. This is indubitably true, because the effect would be to legalize what the act expressly forbids.

We are therefore of the opinion that the facts set forth in the petition of the claimant do not furnish any ground for relief as to this claim.

No order will be made authorizing the taking of testimony in this case.





IN THE SENATE OF THE UNITED STATES.

JUNE 27, 1856.—Read, referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled :*

The Court of Claims respectfully presents the following documents as the report in the case of

CASSIUS M. CLAY *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Petition of the claimant to Congress and accompanying documents, referred by the House of Representatives to the Court of Claims and now returned to the House in a separate envelope.
3. Opinion of the Court refusing an order, to take testimony, delivered by Judge Blackford.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this twenty-fifth day of June,  
[L. s.] A. D. 1856.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

*The Honorable the Court of Claims :*

The petition of Cassius M. Clay, of the commonwealth of Kentucky, respectfully sheweth :

That during the late war between the United States and Mexico, your petitioner was a captain in the service of the United States. That he was attached to the Kentucky regiment of cavalry, under Colonel Marshall, and, preparatory to departing for Mexico, was stationed at or near Louisville, Kentucky. That on the 3d day of July, 1846, the day before said regiment embarked for Memphis, a guard, under the command of Lieutenant Sartin, was ordered to Louisville to



apprehend and bring in deserters, a considerable number of whom were said to be in a house of ill-fame, belonging to, or kept by one Eliza Bowles. Lieutenant Sartin proceeded to the execution of the order. He was dressed in his uniform and accompanied by the guard which he commanded. On arriving at the house indicated, he was not only denied admission, but fired upon from the house. Two of his men were wounded and a horse killed. He returned to camp, reported the circumstances, and in addition to what has been above stated, added that some were supposed to be killed in the encounter.

About one or two o'clock in the morning, your petitioner was awakened in his tent by Colonel Field, then in command, who ordered him to take a reinforcement, to enter the house and bring in the deserters.

Your petitioner, being a subordinate officer, felt himself imperatively bound to obey the orders of his superior in authority. Anticipating, from what had previously occurred, that resistance would be made, the house was quietly surrounded, and orders given that all the doors should be simultaneously broken open. This was what he deemed a prudent order, calculated as well to effect the object which was to be accomplished, as by the promptness of the movement to prevent the effusion of blood.

His orders were obeyed but it appeared that the deserters of whom he was in quest; had escaped through a back way. No man was found on the premises but one, by the name of Steed. The soldiers, who were exasperated at the conduct of the inmates of the house on the previous evening, were, with great personal difficulty on his part, prevented from taking summary vengeance upon Steed and Mrs. Bowles. He succeeded in protecting them from personal injury, and not only did his conduct receive the commendation and approval of the commanding officer under whose orders he had acted, but Mr. Steed expressed his personal thanks and gratitude for this protection which he had been able to afford him.

Your petitioner further shows, that after his return from Mexico a suit was instituted against him for this alleged trespass, by Mrs. Bowles, *alias* Lang, and a verdict rendered against him, upon which judgment was pronounced, which in October, 1848, amounted, principal, interest and costs, to the sum of \$533 20, which he has paid.

It is presumed that it is unnecessary to remind this honorable Court, that while the judicial department of this government has ever recognized the subordination of the military to the civil authority, and therefore held that an officer cannot justify, in an action of trespass, by producing the order of his superior in command, directing the act which has been performed, yet the government has ever acknowledged its obligation to indemnify and save harmless the individual who, in obedience to such order, has incurred personal responsibility. This principle, as equally applicable to subordinates both in the civil and military departments of the government, has so frequently been asserted, and, as your petitioner is advised, in no one instance repudiated, that he forbears at this stage of the case to cite any of the numerous cases in which relief has been afforded under similar circumstances, reserving the right, should the principle be questioned

before this tribunal, which he cannot anticipate, to present to your honorable Court numerous cases in which it has been settled as the uniform practice of the government to give to the officer full indemnity for any losses he may have incurred by a faithful obedience to the orders which it was his duty to obey, not only by reimbursing him the full amount of any judgment that may have been recovered against him, with interest, but his own costs and counsel expenses.

To this extent, therefore, your petitioner asks the judgement of your honorable Court, viz: "that he may be reimbursed the amount of the judgment so recovered against him, with the costs and counsel fees which he has expended in the defence of the suit brought against him, up to the day of reimbursement, and for the expenses, costs, and fees incurred and payable by him in the prosecution of this claim."

He asks, further, in regard to the foregoing claim, to lay before your honors, from the official documents of Congress, a petition presented by him, with the accompanying papers, marked 30th Congress, 2d session, report No. 130; also report No. 150, 2d session 33d Congress, with a bill in favor of the claim.

Should the validity of such a claim be controverted before your honorable Court, or the sufficiency of the evidence be questioned, your petitioner respectfully asks that he may be in due time apprised of what is deficient, that he may supply the defect.

Your petitioner presents in this case another item of claim. In November or December, 1846, he was ordered by Colonel Marshall to disperse, by a forced march, a band of robbers who were threatening the train from Camargo to Monterey. Upon reaching the point where it was supposed that his services would be required, he was ordered to Monterey; from Monterey to Saltillo, by General Marshall; from Saltillo to Palomas, by General Butler; from Palomas to Encarnacion, by Major Gaines. At this last place he was taken prisoner. Under these circumstances, all the baggage and property which he had with him in Mexico was lost, including many valuable papers. The actual cost of the articles of property thus lost amounted to upwards of \$1,370. This case was also presented to the House of Representatives, and on the 14th of March, 1848, the Committee of Claims made a report, 30th Congress, 1st session, No. 365, with a bill, H. R. No. 331. This report, while acknowledging to the fullest extent the obligation of the United States to make compensation for losses thus sustained by individuals employed in the service of the country, yet, by some estimates or process of reasoning not explained, proposed the very inadequate remuneration for certain items of the claim to the extent of \$760, leaving the other items wholly unnoticed, and no reason assigned for the disallowance of them.

Your petitioner asks at the hands of your honorable Court the full allowance of his entire claim, with interest from the time of the incurring of the losses which he sustained, say January 1, 1847. He appends hereto the report of the Committee of Claims above referred to, to which is appended his memorial and the certificate of Major Gaines, then a member of the House; also report No. 150, above referred to, adverse to this claim.

Your petitioner alleges that jurisdiction has been given to this

Court by the act of Congress establishing the same, and he prays for such relief as the justice of his claims, of which he is the sole owner, calls for.

R. S. COXE,  
JNO. M. McCALLA,  
*Counsellors and Attorneys.*

STATE OF KENTUCKY, }  
County of ———, } *scd.*

Personally appeared this day before me, a justice of the peace in and for the county and State aforesaid, Cassius M. Clay, and made oath that the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

——— ———, *J. P.*

STATE OF KENTUCKY, }  
County of ———, } *scd.*

I, ———, clerk of said county, do hereby certify that ———, esq., whose name is subscribed to the foregoing certificate, is a justice of the peace, duly commissioned and sworn, in and for said county.

Given under my hand, and the seal of my office, this ——— day of ———, 1855.

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CASSIUS M. CLAY *vs* THE UNITED STATES.

Opinion of the Court delivered by BLACKFORD, J.

The petition in this case contains two distinct demands. The first demand is as follows:

During the late war between the United States and Mexico, your petitioner was a captain in the service of the United States. He was attached to the Kentucky regiment of cavalry, under Colonel Marshall, and, preparatory to departing for Mexico, was stationed at or near Louisville, Kentucky. On the 3d of July, 1846, the day before said regiment embarked for Memphis, a guard, under the command of Lieutenant Sartin, was ordered to Louisville to apprehend and bring in deserters, a considerable number of whom were said to be in a house of ill-fame belonging to or kept by one Eliza Bowles. Lieutenant Sartin proceeded to the execution of the order. He was dressed in his uniform, and accompanied by the guard which he commanded. On arriving at the house indicated, he was not only denied admission, but fired upon from the house. Two of his men were wounded and a horse killed. He returned to camp, reported the circumstances, and, in addition to what has been above stated, added that some were supposed to be killed in the encounter.

About one or two o'clock in the morning your petitioner was awakened in his tent by Colonel Field, then in command, who ordered him to take a reinforcement, to enter the house, and bring in the deserters.

Your petitioner, being a subordinate officer, felt himself imperatively bound to obey the orders of his superior in authority. Anticipating, from what had previously occurred, that resistance would be made, the house was quietly surrounded, and orders given that all the doors should be simultaneously broken open. This was what he deemed a prudent order, calculated as well to effect the object which was to be accomplished, as by the promptness of the movement to prevent the effusion of blood. His orders were obeyed; but it appeared that the deserters, of whom he was in quest, had escaped through a back way. No man was found on the premises but one by the name of Steed. The soldiers, who were exasperated at the conduct of the inmates of the house on the previous evening, were, with great personal difficulty on his part, prevented from taking summary vengeance upon Steed and Mrs. Bowles. He succeeded in protecting them from personal injury, and not only did his conduct receive the commendation and approval of the commanding officer under whose orders he had acted, but Mr. Steed expressed his personal thanks and gratitude for this protection which he had been able to afford him.

Your petitioner further shows, that after his return from Mexico, a suit was instituted against him, for this alleged trespass, by Mrs. Bowles, *alias* Lang, and a verdict rendered against him, upon which judgment was pronounced, which, in October, 1848, amounted, principal, interest, and costs, to the sum of five hundred and thirty-three dollars and twenty cents; which he has paid.

The prayer of this first part of the petition is, that the claimant may be reimbursed the amount recovered against him as aforesaid. There is no legal ground for that claim. The government does not undertake to indemnify the officers of the army as to damages which may be recovered against them in cases like the present.

Supposing the order, which is not very distinctly stated, to be that the claimant should *break open* the house of Mrs. Bowles for the purpose mentioned, it was no justification for the trespass, because the order was unlawful. An officer is justifiable in acting under the order of his superior officer, if that order is legal, (2 Stat. at Large, p. 361;) but not if the order be illegal.—(Mitchell *vs.* Harmony, 13 Howard, 137.)

There is nothing in the petition to show that Colonel Field had any authority to order the house to be broken open. If it was necessary so to enter the house to search for deserters, the proper authority to do so should have been obtained from a civil magistrate. It appears from a document, made part of the petition, that in the suit in which the judgment was recovered, the claimant's plea of justification, under said order, was held to be insufficient, on the ground that the order was unlawful; and that decision is no doubt correct. We are therefore of opinion that the government is not legally bound to indemnify the claimant against the judgment. There are cases in which Congress has relieved military officers, acting under unlawful orders,

from judgments rendered against them. Mitchell's case, (10 Stat. at Large, 727,) cited by the claimant's counsel, is such a one. But the power to relieve in such cases belongs, we think, exclusively to Congress.

The other part of the petition is as follows:

In November or December, 1846, the claimant was ordered by Colonel Marshall to disperse, by a forced march, a band of robbers who were threatening the train from Camargo to Monterey. Upon reaching the point where it was supposed that his services would be required, he was ordered to Monterey; from Monterey to Saltillo, by General Marshall; from Saltillo to Palomas, by General Butler; from Palomas to Encarnacion, by Major Gaines. At this last place he was taken prisoner. Under these circumstances all the baggage and property which he had with him in Mexico were lost, including many valuable papers. The actual cost of the articles thus lost amounted to upwards of thirteen hundred and seventy dollars. The items are set out in a memorial to Congress, which is made part of this petition.

This last mentioned claim, which is for the value of goods taken by the enemy in time of war, cannot be sustained. Vattel, in speaking of damages to real estate caused by the enemy, says: "All the subjects are exposed to such damages; and woe to him on whom they fall! The members of a society may well encounter such risk of property, since they encounter a similar risk of life itself. Were the State strictly to indemnify all those whose property is injured in this manner, the public finances would soon be exhausted; and every individual in the State would be obliged to contribute his share in due proportion—a thing utterly impracticable."—(Vattel's Law of Nations, chapter 15, section 232.) We think the reason of that rule is as applicable to the seizure of personal property as it is to damages to real estate. The present claim is not founded on any general law, and this court therefore furnishes no remedy for the loss.

There will not, therefore, be any order for testimony in this case.





IN THE SENATE OF THE UNITED STATES.

MARCH 6, 1856.—Referred to the Committee on Claims.  
DECEMBER 18, 1857.—Referred to the Committee on Claims.

THE COURT OF CLAIMS submitted the following

REPORT.

SAMUEL M. PUCKETT *vs.* THE UNITED STATES.

*to the Senate of the United States:*

The undersigned, by direction of the Court of Claims, in pursuance of law, herewith respectfully transmits the following papers in the case above mentioned :

1. Petition of Samuel M. Puckett.
2. Opinion of the Court.

SAM'L H. HUNTINGTON, [SEAL.]  
*Chief Clerk Court of Claims.*

*to the honorable the Court of Claims, at Washington city, in the District of Columbia.*

The petition of Samuel M. Puckett, a citizen of Rankin county, in the State of Mississippi, respectfully represents: That one John E. Richardson became the purchaser of a large tract of land, to wit: the southwest quarter and the west half of southeast quarter section eight; the southeast quarter and the east half of the northwest quarter section seventeen; all of section twenty; the northwest quarter of section twenty-nine; the south half and the northeast quarter of section thirty; and the northwest quarter and the east half of the northeast quarter section thirty-one, township eleven, range even east, in Neshoba county, in said State. That for and in consideration of said purchase, that three promissory notes were executed by the said John E. Richardson, with your petitioner and one John . Gooch as his securities, for the sum of ten thousand six hundred and eighty-nine dollars and forty-one cents, payable to the United States at one, two, and three years. And that your petitioner, sub-



sequent to the purchase, became a joint partner with the said John E. Richardson in said lands. That the land was sold by the United States marshal as the property of one Wiley P. Harris, who was late register of the land office at Columbus, in said State. That subsequently suits were instituted in the United States district court at Jackson, Mississippi, upon the three promissory notes above mentioned, as they became severally due, and judgments were obtained against the said John E. Richardson, your petitioner, and John S. Gooch, for the several amounts of said promissory notes, including interest and cost of said suits. Petitioner says that he paid the amount of one of the said judgments and cost in full, and all costs on the other two judgments, and perhaps a small portion of the debt on one of the other judgments. Petitioner says that the whole amount so paid by him was about the sum of five thousand dollars, and that the same (after paying costs of suits) passed into the treasury of the United States, as your petitioner is informed and believes; and that subsequent to the payment of the money as herein stated, he (petitioner) ascertained that the lands sold as the property of Wiley P. Harris was, in fact, the property of other persons, and that Wiley P. Harris NEVER had title to said lands, and consequently no title could pass by virtue of the sale by the United States. That the sale was made without any notice of defect of title, and under the assurance by the United States marshal that he would make title at a future day. But so it is: The United States marshal wholly failed to comply with the conditions of sale, in executing title to the land herein described, at the time of the sale thereof, or at any other time thereafter, as your petitioner avers and believes.

Therefore, this petitioner says that the consideration of the promissory notes herein described has totally failed, and he says that he believes he is entitled to and demands relief; that is to say, a recovery of and from the United States for the sum of five thousand dollars, with interest from May, 1840, and the cost of this proceeding.

SAMUEL M. PUCKETT, *Claimant*.

SAMUEL M. PUCKETT *vs.* THE UNITED STATES.

The opinion of the Court was delivered by Chief Justice GILCHRIST:

This claim is, substantially, an action against the United States for money had and received. It appears from the petition that the United States marshal for the district of Mississippi sold certain fractional sections of land situated in Neshoba county, in Mississippi, as the property of one Wiley P. Harris, to one John E. Richardson, for the sum of \$10,689 41. The claimant and one Gooch became sureties for Richardson for the payment of the purchase money, and, subsequently, the claimant became a partner with Richardson in the purchase, and signed promissory notes for the same, payable to the United States. Suits were instituted upon the notes, and judgment obtained thereon, against the makers for the amount due, including interest and costs. The claimant paid the sum of \$5,000, which

passed into the treasury of the United States, and, subsequent to the payment of the money, he ascertained that the lands sold as the property of Harris in fact belonged to other persons, and that Harris never had any title to them, and, consequently, no title could pass by virtue of the sale by the United States. The sale was made without any notice of any defect in the title, and under the assurance by the marshal that he would make a title at a future time ; which, however, has not been done.

The claimant alleges that the consideration of the notes has totally failed, and that he is entitled to recover of the United States the sum of \$5,000, with interest.

The assurance by the marshal that he would make a title to the land at a future day cannot be the foundation of any right in the claimant. Whatever evidence his declarations may furnish of his personal liability in a suit against himself, they cannot bind the United States. If he steps out of his official duty, and does what the law has given him no authority to do, he may make himself personally responsible, and the injured party must look to him for redress. He is the mere minister of the law to execute the order of the court, and a due discharge of his duty does not require more than that he should give to purchasers a fair opportunity of examining and informing themselves of the nature and condition of the property offered for sale.—(*The Monte Allegre*, 9 Wheaton, 645.) Nor upon a judicial sale, which we presume this to have been, is there any implied warranty of title. Neither the marshal nor the auctioneer, while acting in the scope of their authority, can be considered as warranting the property sold, nor can the marshal do any act that shall expressly or impliedly bind any one by warranty —(*Ibid.*, 645.) It is on the same principle that it is held in South Carolina that there is no implied warranty in a sale of land made by the ordinary for partition, and the purchaser who has been evicted by title paramount cannot recover the purchase money back from the ordinary, though it still remains in his hands undisturbed.—(*Evans vs. Dendy*, 2 Speers, 9.)

So it has often been held that there is no implied warranty in a sheriff's sale.—(*Yates vs. Bond*, 2 McCord, 382 ; *Davis vs. Murray*, 2 Rep. Con. Ct., 143 ; *Bashore vs. Whistler*, 3 Watts, 490.) In South Carolina, where one purchased land at a sheriff's sale, to which the defendant in the execution had no title, the sheriff may compel him by action to pay the purchase money without having first tendered the sheriff's titles.—(*Moore vs. Akin*, 2 Hill, S. C., 403.)

As there is no implication of a warranty, the question arises whether, upon the principle which regulates the action of assumpsit for money had and received, the claimant can recover of the United States the consideration he has paid.

It is provided by the 1st section of the act of May 7, 1800, (2 Statutes at Large, 61,) that when the United States shall have received seizin and possession of lands delivered in satisfaction of a judgment, it shall be lawful for the marshal of the district "to expose the same to sale at public auction, and to execute a grant thereof to the highest bidder on receiving payment of the full purchase money ; which grant so made shall vest in such purchaser all the right, estate, and interest

of the United States in and to such lands or other real estate." Although there is no express statement to that effect, we can make no other inference from the petition than that the lands mentioned were sold by the marshal by virtue of the authority vested in him by this act. If such be the case, he can do no more than to convey to the purchaser such right and interest as the United States possessed, and therefore the case is like that where a person releases to another all his right and interest in a tract of land, and receives the consideration therefor. If, in such a case, the grantee can recover of the grantor the consideration he has paid for the release, on the ground that the consideration has failed, then this claimant has a right to recover of the United States.

It has been repeatedly held that where money is paid for land conveyed by deed of release and quit-claim, it cannot be recovered back, though the title be wholly defective, unless there be fraud on the part of the vender.—(*Gates vs. Winslow*, 1 Mass., 65; *Wallis vs. Wallis*, 4 Mass., 135; *Emerson vs. Washington county*, 9 Greenl., 94.) In the case of *Soper vs. Stevens*, 2 Shep., 133, it was held that where a note, given in consideration of a quit-claim deed of land, and where there is no fraud, has been paid by the grantee, the money cannot be recovered back on the eviction of the grantee by an older and a better title. In all such cases as have been cited, the money is considered as having been paid in consideration of the conveyance of the interest the grantor has in the premises, such as it may be, and not in consideration that the grantor will convey a good title to the land. The grantee buys only what the grantor has to sell, and where, without fraud, he sells only his interest, the consideration cannot be said to have failed, so as to give a right of action to the grantee. The United States are entitled to the benefit of this principle, and, so far as the facts appear in the petition, there is no more reason for permitting the claimant to recover than there would be for rendering a judgment for the plaintiff upon a similar state of facts in an ordinary suit at law. Our opinion is, that upon the case stated the claimant is not entitled to recover, and that there is no principle of law that would authorize us to order testimony to be taken.

IN THE SENATE OF THE UNITED STATES.

MARCH 6, 1856.—Referred to the Committee on Claims.  
DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

R E P O R T :

*To the honorable the Senate and House of Representatives of the United States :*

ROBERT ROBERTS, *vs.* THE UNITED STATES.

The following papers in this case (no briefs filed) are respectfully submitted :

1. Two petitions of the claimant.
2. Letter from the State Department.
3. Opinion of the Court.

By order of the Court.

In testimony whereof I have hereunto set my hand and affixed  
[SEAL.] the seal of said Court at Washington, on the day and year  
above written.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

WASHINGTON, *March* 5, 1856.

COURT OF CLAIMS.  
*In re* } PETITION OF ROBERT ROBERTS.  
THE LOSS OF THE SHIP "EXPERIMENT."

*To the Court of Claims :*

The petition of Robert Roberts, a citizen of the United States, resident in new York, respectfully shows :

That on or about the 28th day of August, in the year 1805, your petitioner and one John Queen, also a citizen of the United States, residing in the said city, were joint owners of the American ship *Experi*

ment, whereof James Moncrief was master, and then lying in the port of New York, and bound on a voyage to Falmouth and Montego Bay, in the island of Jamaica; that on or about said 28th day of August, said ship, with a full cargo on board, set sail from New York, and being duly furnished with all necessary papers and documents to prove the entire neutrality of both ship and cargo, prosecuted her said voyage until the 2d day of October following, when she arrived at Falmouth in the said island of Jamaica, where she discharged a part of her cargo, and on the 20th day of said month continued her voyage for Montego Bay as aforesaid, and while proceeding to said port the said ship was captured by a French privateer, who took forcible possession of said ship and cargo; that thereafter the said ship (the *Experiment*) was recaptured from said privateer by the English ship of war called the *Wolf*, and carried back to the said port of Falmouth; whence, after a detention of several days, the said recaptors sailed for said Montego Bay, where said *Experiment* was proceeded against by said recaptors in the court of admiralty for salvage, and by order of said court said ship and cargo were sold for salvage and purchased at said sale by said master for the benefit of whom it might concern, and the amount of salvage decreed to the recaptors was paid by said master in pursuance of said decree; and said ship thereafter returned to New York, greatly damaged in consequence of said illegal capture and subsequent detention, where she was sold for the benefit of whom it might concern, for the sum of \$5,688.

And your petitioner further shows that the value of the said ship, with her outfits on the voyage aforesaid, was the full sum of \$14,217 42, and that the charges in Jamaica for salvage and other expenses, in consequence of the said recapture by the French as aforesaid, amounted to the sum of \$3,284 82; that the premium of insurance upon the owner's risk, properly allowable to them, amounted to the sum of \$121 70, making the whole cost and charges on said ship \$17,923 94, and leaving the whole amount of loss \$12,235 94.

And your petitioner further shows that said ship was insured at the office of the Union Insurance Company, of Philadelphia, for the sum of \$10,000, and thereafter, upon the capture of said ship, as before stated, the said John Queen and your petitioner received for and on account of said loss upon said insurance, the sum of \$3,000. In consequence, therefore, of said illegal capture the final loss sustained by said John Queen and your petitioner (after deducting said sum received from said insurance company) was \$9,235 94.

Your petitioner further states that being erroneously advised that the said ship *Experiment* was captured by a Spanish cruiser, and that her loss constituted a claim provided for by the act of Congress passed March, 1821, to carry into effect the treaty with Spain, concluded with Spain February 22, 1819, he presented a claim for indemnity to the commission appointed to carry said treaty into effect, who certified to the loss, as appears by their report, Doc. 417 of the first session of the twenty-third Congress, p. 17, but disallowed the claim on the ground that the privateer was French instead of Spanish.

Your petitioner further states that subsequently, and after the conclusion of the treaty with France, on the 4th of July, 1831, he

attended before the commissioners appointed under said treaty to carry its provisions into effect, and prayed to be allowed indemnification for his aforesaid loss, but the said commissioners decided that the said privateer was Spanish, and that the loss should have been allowed by the commissioners under the treaty with Spain, who had rejected it.

Your petitioner further represents that in the year 1845 he petitioned Congress for indemnity; that his petition was referred to the Committee of Claims in the House of Representatives, who reported a bill recognizing the validity of your petitioner's claim, which, to the best of your petitioner's knowledge and belief, passed the House, but was not reported to the Senate in due time for the action of that body. The same report was subsequently made by the Committee of Claims to the thirtieth Congress, and is styled Report No. 2, to accompany Bill No. 2, thirtieth Congress, first session, House of Representatives, December 20, 1847, but never received any final action by Congress.

Your petitioner further respectfully represents that John Queen, the part owner with him of the ship *Experiment*, departed this life on or about the 21st day of April, A. D. 1816, intestate; and that the administration of the goods, chattles, credits and effects of the said John Queen hath been granted to your petitioner by the surrogate of the city and county of New York, where said Queen resided at the time of his decease; by virtue whereof your memorialist was and is entitled, as the personal representative of said Queen, to receive whatever may be paid or allowed on account of said claim.

Your petitioner further respectfully represents that he was, and is, entitled to be allowed indemnity under and by virtue of the act of Congress of July 13, 1832, to carry into effect the convention between the United States and his Majesty the King of the French, concluded at Paris on the 4th of July, 1831, for the full amount of his aforesaid loss, after deducting the sum received for insurance as aforesaid, together with interest on the amount of loss from the time when the several amounts awarded by said Commissioners became payable.

ROBERT ROBERTS.

*City and County of New York, ss.*

Robert Roberts, citizen of the city and State of New York, being duly sworn, deposes and says, that he has read the foregoing petition; that he knows the contents thereof, and the same is true, except as to those matters stated on his information and belief, and those he believes to be true.

J. S. HARBERGER,  
*Notary Public.*

JOHN BIGELOW,  
*Attorney and of Counsel for the Petitioner.*

## IN THE UNITED STATES COURT OF CLAIMS.

*To the Honorable the Judges of the Court of Claims:*

The petition of Robert Roberts, of the city of New York, State of New York, in his own right, and as administrator of John Queen, respectfully sheweth: That your petitioner and the said John Queen were the joint owners of the ship *Experiment*, which was captured on her voyage from New York to Jamaica in the year 1805, by a privateer bearing Spanish colors, and which was immediately thereafter recaptured by a British cruiser and carried into Jamaica, and, under a decree of a British court of admiralty, upon a libel filed for salvage by the captors, was sold. That the loss sustained by himself and partner by the capture and detention of the ship, the salvage and other expenses, was, exclusive of interest, \$9,235 44. That the aforesaid capture was without any just cause, and was an infraction of the rights of the United States as a neutral nation, and constituted a good claim for restitution against the government whose vessel the privateer aforesaid was.

And your petitioner further shows that he presented his claim before the commissioners appointed under the act of Congress of March 3, 1821, to carry into effect the treaty with Spain, concluded the 22d February, 1819; but the claim was disallowed, on the ground that the privateer was French, and not Spanish, it having been so decreed by the British court of admiralty when the vessel was condemned.

That your petitioner brought said claim before the board of commissioners appointed to carry into effect the treaty concluded with France in 1831, but said board refused to entertain said claim, upon the ground that the privateer making said capture was a Spanish and not a French vessel; so that your petitioner, though clearly entitled to indemnification from one or the other of said governments, has been excluded from the provisions made by each for indemnity for illegal captures by an alternate denial of jurisdiction.

And your petitioner further shows that the United States, in the treaties aforesaid, both with France and Spain, has in her sovereign capacity released those governments from all further reclamations and claims to indemnity than such as are therein provided for, of the like character as those therein provided for, and has thereby become responsible for claims of that character which have been excluded from the benefits of the provisions of said treaties.

Your petitioner is informed and believes that there is now remaining in the treasury of the United States a portion of the funds paid by France and Spain for the purpose of satisfying claims to indemnity under the provisions of said treaty, but that at any rate he is entitled to the judgment of this honorable Court for the full amount of his loss out of the treasury of the United States. That he is the sole owner of one half of said claim, and the administrator of the sole owner of the other half of said claim; that it has heretofore been presented to Congress, and the action of that body thereon, so far as your petitioner is informed, is as follows: In the 24th, 26th, and 28th Congresses, his memorial was not acted upon; in the 25th and 31st Congresses the

reports were adverse in the House; and in the 29th and 30th Congresses the reports were favorable, but the bills could not be reached on the calendar before the close of the sessions.

And, as in duty bound, your petitioner will ever pray, &c.

ROBERT ROBERTS.  
A. H. LAWRENCE,  
*Attorney for Petitioner.*

STATE OF NEW YORK, }  
County of New York. } ss.

Personally appeared before me, Michael Connolly, a justice of the peace in and for said county, Robert Roberts, and made oath, this thirteenth day of July, A. D. 1855, that the facts stated in the foregoing petition are true, to the best of his knowledge and belief.

MICHAEL CONNOLLY,  
*Justice of the Peace.*

STATE OF NEW YORK, }  
City and county of New York, } ss.

I, Richard B. Connolly, clerk of the city and county of New York, and also clerk of the supreme court for the said city and county of New York, being a court of record, do hereby certify, that Michael Connolly, before whom the annexed deposition was taken, was at the time of taking the same a justice of the peace in and for said city and county, duly elected and sworn, and that his signature thereto is genuine, as I verily believe.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county, the thirteenth day of July, [L. s.] 1855.

RICHARD B. CONNOLLY, *Clerk.*

Judge BLACKFORD delivered the opinion of the Court, which is as follows:

The petition in this case relies on an alleged illegal seizure by Spain or France, in 1805, of the brig *Experiment*, and on treaties between those nations and the United States.

We shall first examine the case on the petitioner's complaint, that the seizure was by a Spanish vessel.

The United States, by the 9th article of the treaty of 1819 with Spain, renounced all such claims against Spain as the one now before us.

The 11th article of that treaty contains the following provision: "the United States exonerating Spain from all demands in future, on account of the claims of their citizens to which the renunciations herein contained extend, and considering them entirely cancelled, undertake to make satisfaction for the same, to an amount not exceeding five millions of dollars. To ascertain the full amount and validity of those



claims, a commission, to consist of three commissioners, citizens of the United States, shall be appointed by the President, by and with the advice and consent of the Senate, which commission shall meet at the city of Washington, and, within the space of three years from the time of their first meeting, shall receive, examine, and decide upon the amount and validity of all the claims included within the descriptions above mentioned. The said commissioners shall take an oath or affirmation, to be entered on the record of their proceedings, for the faithful and diligent discharge of their duties; and in case of the death, sickness, or necessary absence, of any such commissioner, his place may be supplied by the appointment, as aforesaid, or by the President of the United States, during the recess of the Senate, of another commissioner in his stead. The said commissioners shall be authorized to hear and examine, on oath, every question relative to the said claims, and to receive all suitable authentic testimony concerning the same. And the Spanish government shall furnish all such documents and elucidations as may be in their possession for the adjustment of the said claims according to the principles of justice, the laws of nations, and the stipulations of the treaty between the two parties of October 27, 1795, the said documents to be specified, when demanded, at the instance of the said commissioners."

The commissioners thus provided for by the treaty were afterwards appointed, and the board was organized at the city of Washington in June, 1821. The statement of the petition relative to the action of said board on the claim we are considering is as follows: "And your petitioner further shows that he presented his claim before the commissioners appointed under the act of Congress of March 3, 1821, to carry into effect the treaty with Spain concluded the 22d of February, 1819, but the claim was disallowed on the ground that the privateer was French and not Spanish, it having been so decided by the British court of admiralty when the vessel was condemned."

We understand, from this language of the petition, that said decision of the commissioners was against the claim upon the merits. To sustain the claim it was necessary to show, among other things, that the seizure was by a Spanish vessel. The petition says that the claim was disallowed on the ground that the privateer was French and not Spanish. That was surely a disallowance on the merits, because it was a disallowance on the ground that a fact material to the establishment of the claim was not proved.

The only other question in this part of the case necessary to be decided is, whether or not the said decision of the board of commissioners is a bar to so much of the petition as alleges the seizure to have been by a Spanish vessel?

We have recently had a question to decide very similar to the one now before us; and the following observations made on that occasion are applicable to this case: "The final decision of the board against the claim was rendered by a tribunal specially provided for by the treaty for the adjudication of such claims, to which tribunal the original claimant had submitted the case for decision, and from which decision there is no appeal given to any other tribunal. The judgment

of the board stands upon the same ground with the judgment of any judicial tribunal of exclusive jurisdiction."

"The nature and effect of a judgment of this same board of commissioners, under the same treaty of 1819 with Spain, have been examined and settled by the Supreme Court of the United States. Judge Story, in delivering the opinion of the court, uses the following language: 'The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the amount and validity of the asserted claims upon Spain for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review in any judicial tribunal; an amount once fixed is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty.'—(*Comegys vs. Vasse*, 1 Peters' Rep., 193, 212;'' *Thomas and others vs. The United States*, decided by this court.)

These decisions are precisely in point, and show that the question we have just been considering must be determined against the claimant.

We are next to examine the case on the petitioner's complaint, that the seizure was by a French vessel.

The first article of the convention between the United States and France, of the 4th of July, 1831, is as follows: "The French government, in order to liberate itself completely from all the reclamations preferred against it by citizens of the United States for unlawful seizures, captures, sequestrations, confiscations, or destructions of their vessels, cargoes, or other property, engages to pay a sum of twenty-five millions of francs to the government of the United States, who shall distribute it among those entitled, in the manner and according to the rules which it shall determine."—(8 Stat. at Large, 430.)

On the 13th of July, 1832, an act of Congress was passed to carry into effect the said convention with France. The first section of that act is in these words: "The President of the United States, by and with the advice and consent of the Senate, shall appoint three commissioners, who shall form a board, whose duty it shall be to receive and examine all claims which may be presented to them under the convention between the United States and France, of the 4th of July, 1831, which are provided for by the said convention, according to the provisions of the same, and the principles of justice, equity, and the law of nations. The said board shall have a secretary, versed in the English, French, and Spanish languages, and a clerk, both to be appointed by the President, by and with the advice and consent of the Senate; and the commissioners, secretary, and clerk, shall, before they enter on the duties of their offices, take oath well and faithfully to perform the duties thereof."—(4 Stat. at Large, 574.)

The commissioners provided for by said act of 1831 were accordingly appointed, and the board was afterwards organized as the act required.

The petition contains the following statement: Your petitioner brought said claim before the board of commissioners appointed to carry into effect the treaty concluded with France in 1831, but the board refused to entertain said claim, upon the ground that the vessel making said capture was a Spanish, and not a French vessel, so that your petitioner, though clearly entitled to indemnification from one or the other of said governments, has been excluded by the provisions made by each for indemnity for illegal captures, by alternate denial of jurisdiction. The petition here shows that the named Board of Commissioners rejected the claim upon the merits. The ground of the rejection was, according to the petition, that the offending vessel was Spanish. Now, the claim before that board being for a French spoliation, could not be sustained without proof that the offending vessel was French; and the decision against the claim for the want of that proof was a decision on the merits.

There is but one other question in this part of the case which must be examined, and that is, whether or not the decision of the named board of commissioners is a bar to so much of the petition as alleges the seizure to have been by a French vessel.

Our answer to this question must be similar to that given, in the former part of this opinion, to another question. The decision against the petitioner, made by the commissioners appointed under the treaty with France, to whom he had submitted the present demand to be examined, is a bar to the claim. The board had exclusive jurisdiction of the case, under the act of Congress, and there is no law giving appeal from the judgment of any other tribunal.

It may be proper to mention that, believing the decisions of the two boards of commissioners on the claim now before us to be a material part of the case, we applied to the State Department for information on the subject. The answer of the department is as follows:

"The record of the proceedings of the commissioners, under the convention with Spain of 1819, has been examined, and it appears that the claim of Jonathan Jenks, growing out of the capture of the brig *Jane*, was duly presented to the board of commissioners, and was disallowed. The claim of Robert Roberts, growing out of the capture of the brig *Experiment*, was presented to the same board of commissioners, and was disallowed. The same claim was also presented to the board of commissioners appointed to carry into effect the treaty with France of 1831, and by that board was also disallowed. The evidence of these decisions is derived from minutes on the dock of the several boards of commissioners, but no document can be found in either case stating the principle on which the decision was founded.

This communication shows what the petition admits, that the claim in question had been disallowed by both said boards of commissioners to which it was presented.

The petition, in order to show the liability of the government of the United States, offers the following argument: "And your petitioner further shows, that the United States, in the treaties aforesaid, by her treaty with France and Spain, has, in her sovereign capacity, released the governments from all further reclamations and claims to indemnity other than such as are therein provided for, of the like character as th

herein provided for, and has thereby become responsible for claims of that character which have been excluded from the benefits of the provisions of said treaties."

This argument, which assumes the claim to have been valid against either Spain or France, has been already, we think, sufficiently answered. The boards of commissioners, legally organized for the determination of such claims as the one before us, have, upon the application of the petitioner himself, examined his claim and decided against its validity. The fact therefore assumed as the basis of the argument, namely: the validity of the claim against either Spain or France previously to the treaties referred to, does not exist.

The decisions of said boards of commissioners against the claim, like the judgment of a court of competent jurisdiction, are, as we have before shown, a bar to this petition for the same demand.

It appears to the Court, therefore, that the facts set forth in the petition do not furnish any ground for relief.



IN THE SENATE OF THE UNITED STATES.

JULY 23, 1856.—Read and referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents in the report in the case of

WILLIAM NEIL AND OTHERS *vs.* THE UNITED STATES.

1. The petition of the claimants.
2. Documents presented by the claimants as exhibits in the case.
3. Opinion of the Court unfavorable to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this tenth day of July,  
L. S.] A. D. 1856.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

IN THE UNITED STATES COURT OF CLAIMS.

WILLIAM NEIL, WILLIAM S. SULLIVANT and DARIUS TALLMADGE, for the use of "The Ohio Stage Company," *vs.* THE UNITED STATES.

*To the honorable the Court of Claims of the United States:*

Your petitioners respectfully represent: That on and prior to the 1st November, 1845, they were contractors with the Post Office Department for carrying the mails from Wheeling, Virginia, via Zanesville, Columbus, and Xenia, to Cincinnati. That by the terms of the oral contracts covering this service, they were required to convey mails in two lines of coaches daily between Wheeling and Zanesville, and in one line only between Zanesville and Cincinnati, to arrive at Cincinnati by 6 o'clock p. m., but reserving to the department the right to order on a second line of coaches between Zanesville and Columbus, at an additional compensation of \$1,200 per annum.

Prior to the said 6th November, 1845, they procured from the department its written consent and authority to transport the mails from Xenia to Cincinnati by railroad, the arrival to be made in contract time. The railroad company at this period was running a morning and an afternoon train, either of which took the mails to Cincinnati in contract time; and it frequently happened that the Stage Company were unable to connect with the early train, and consequently forwarded the mails by that of the afternoon. On such occasions it sometimes happened that private intelligence was communicated, by express or otherwise, in the first train, and in advance of the mail to Cincinnati.

On the 6th November, 1845, the First Assistant Postmaster General writes to the contractors on this subject, and, after discussing the matter at length, adds:

"But something more for the future is required—a change in the conveyance of the mails, by which they will be made to reach the Xenia railroad in time for its first train to Cincinnati, to prevent any one from imposing on the public in the manner that has so recently been done. \* \* \* He (the Postmaster General) therefore directs that it be again proposed to you, as it has been heretofore, to run through to Xenia in time to connect with the first train of cars, which it is understood leaves at about 6 or 7 a. m.; that the better to enable this to be done, by putting on a double line over the Columbus and Zanesville portion of the route, as well as the rest, he will allow the amount heretofore bid for that service—\$1,200 a year; and he instructs me to add that, should you decline this, he considers himself at liberty to transfer the contract upon the routes from Wheeling to Cincinnati to those who will carry the mails with the despatch required, at the amount now paid to you, with the \$1,200 allowance additional."

That on the receipt of this letter, Mr. Neil, then president of the Stage Company, communicated his acceptance of the proposition as follows:

"CINCINNATI, *November 11, 1845.*

"DEAR SIR: I have been on the line of railroad from Xenia to this city, and have come to the conclusion at once to accept your proposition made by the Post Office Department as to the transportation of the mails, and shall at once put it into operation.

"Your obedient servant,

"W. NEIL.

"Hon. C. JOHNSON, *Postmaster General.*"

And under date of November 13, 1845, he advises the department that "the mail commenced this morning connecting with the first train of cars at Xenia."

And petitioners aver that, in pursuance of the agreement aforesaid, they, on said 13th November, 1845, put on the second line of coaches between Zanesville and Columbus, and continued to run the same promptly and regularly down to the 30th June, 1848, the end of the contract term, being a period of two years seven months and eighteen days. And that the department took due notice of such service, and

exacted its prompt performance, by the imposition of fines upon the occurrence of an occasional failure of its exact performance according to schedule time.

They further represent and state that, from oversight or negligence on the part of their subordinates having charge of the books and accounts of the Ohio Stage Company, or from other unknown cause, the proper claim for this extra service was not presented and made quarterly during the period of said service; but that some time about the end of said term the claim was brought to the attention of the department, and the agreed compensation demanded for the whole period of said extra service. The claim was considered by the Hon. C. Johnson, Postmaster General, and rejected August 22, 1848.

That subsequently, during the year 1850, the claim was again urged upon the department, and the Hon. J. Collamer, then Postmaster General, declined to look into its merits, on the ground of his want of power to re-examine or overrule a decision of his predecessor in office.

Petitioners further state that the foregoing claim is owned by an unincorporated association, composed of many persons, doing business under the name of "The Ohio Stage Company," and that, in point of fact, the petitioners were merely representatives of the said company, who were all along the real parties interested in said contract—said contract having been taken in the names of one or more of the individual members of the concern, for the sake of convenience, with full knowledge, on the part of the department, that such was the case.

Your petitioners therefore pray that they may have awarded to them the due compensation earned by the extra services performed under the order of the department, and agreed to be paid them, as aforesaid, to wit: compensation for such extra service for the period of two years seven months and eighteen days, at the rate of \$1,200 per annum, being the sum of \$3,160; and such other and further relief as their case may require; and, as in duty bound, they will ever pray, &c.

P. B. EWING,  
*Counsel for Petitioners.*

CITY OF WASHINGTON, }  
*District of Columbia,* } ss.

Before me, the clerk of the Court of Claims, came P. B. Ewing, who, being duly sworn, says that the facts set forth in the foregoing petition are true, as he verily believes.

Witness my hand and seal, this 28th January, 1856.

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WILLIAM NEIL AND OTHERS *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the court:

The petitioners state the following case:

Before the 6th of November, 1845, they contracted with the Post Office Department to carry the mails from Wheeling, Virginia, *via*



Zanesville, Columbus, and Xenia, to Cincinnati. They were to convey the mails in two lines of coaches, daily, between Wheeling and Zanesville, and in one line, only, between Zanesville and Cincinnati. The department reserved a right to order on a second line of coaches between Zanesville and Columbus, at \$1,200 per annum.

Before the 6th November, 1845, the department authorized them to carry the mails from Xenia to Cincinnati, the arrivals to be in contract time. There was both a morning and an afternoon train, but often the Stage Company were unable to connect with the early train, and forwarded the mails by the afternoon train. Private intelligence was sometimes communicated in advance of the mail.

On the 6th of November, 1845, the First Assistant Postmaster General, after alluding to certain alleged impositions on the public, proposed to the claimants to run through to Xenia in time to connect with the first train of cars, and that the better to enable this to be done, by putting on a double line over the Columbus and Zanesville portion of the route, the department would allow them \$1,200 per annum. This proposition was accepted on the 11th of November, 1845, and on the 11th of November the mail commenced connecting with the first train of cars at Xenia. On that day they put on a second line of coaches between Zanesville and Columbus, and ran it regularly to the 30th of June, 1848. The department took notice of this service, and imposed fines on the failure of its exact performance.

Either from oversight or negligence on the part of their subordinates who had charge of the books of the Ohio Stage Company, or from some unknown cause, the proper claim for this extra service was not presented quarterly during the period of the service, but a demand was made for it about the end of the term, which was considered by the department, and rejected on the 22d of August, 1848. In the year 1850 Mr. Collamer declined to examine the merits of the claim, on the ground that he had not the power to re-examine and overrule a decision of his predecessor.

The claimants are the representatives of the Ohio Stage Company, an unincorporated association, the contract having been taken in the names of one or more of the members, for the sake of convenience, with the knowledge of the department.

They claim pay for extra service in running the second line of coaches between Zanesville and Columbus from the 13th of November, 1845, to the 30th of June, 1848, a period of two years seven months and eighteen days, at the rate of \$1,200 per annum, being the sum of \$3,160.

This case is submitted for our decision upon a statement dated August 22, 1848, prepared by the honorable Cave Johnson while he was Postmaster General. It appears from a letter to Mr. Blair, the Solicitor of this Court, from Mr. Dundas, the Second Assistant Postmaster General, dated on the 24th of April, 1856, that this paper prepared by Mr. Johnson "contains a full statement of the facts in the case in question, and the department has nothing further to add in regard to it."

The facts in the case, material to be considered, as they appear in the statement by Mr. Johnson, are as follows :

Neil and Tallmadge, being contractors on the route from Wheeling to Cincinnati, in the spring of 1845, were to leave Wheeling with the mail daily at 12 m., and to reach Cincinnati by 6 p. m., the department reserving the right to order a second line to Columbus, at \$1,200 per annum. It was desirable to expedite the line so as to reach Cincinnati by 10 or 11 a. m., in order to connect with the morning boats to Louisville. For this increased service the contractors asked the additional sum of \$16,000 per annum, which was declined by the department, the Postmaster General having reason to believe that the service could be performed for the sum then paid the contractors with the addition of \$1,200 per year for a second line over the Columbus and Zanesville portion of the route. Of this the contractors were informed by the First Assistant Postmaster General, on the first of November, 1845, who stated to them that the Postmaster General directed "that it be again proposed to you, as it has been heretofore, to run through to Xenia in time to connect with the first train of cars, which, it is understood, leaves at about 6 or 7 a. m.; that the better to enable this to be done by putting up a double line over the Zanesville and Columbus portion of the route, he will allow the amount heretofore bid for that service—\$1,200 a year." Neil accepted this proposition by a letter dated on the 10th of November. In the course of the month, the railroad discontinued their second daily trip, and changed the morning departure from 6 a. m. to 8½ a. m., rendering it impossible to make the arrivals at Cincinnati until after the departure of the morning boat. Before this, Neil had written the Postmaster General that the mails were then going on as the department wished. The mails, however, did not go out by the morning boat; and after some correspondence with the contractors, the Postmaster General, on the 14th day of January, 1847, wrote the postmaster at Columbus, requesting him to inquire of Neil and Tallmadge what was the prospect of having the mails delivered at Cincinnati in season for the morning boats. On the 24th of January, the postmaster replied that there was no ground to hope that a change or increased speed would be made, without a large increase of mail pay. The department, finding that there was no hope of getting the desired expedition to Cincinnati from Neil and Tallmadge, then made a contract with the railroad company. Neil and Tallmadge started the second line of coaches from Zanesville on the 13th day of November, 1845, and ran it during the contract, a period of two years and seven and a half months. Payments were regularly made them on many routes, at the close of each quarter, but no demand was made by them for the \$1,200, until a claim was filed in the year 1848.

Mr. Johnson proceeds to say, that the claim was made upon the ground that the service was performed in compliance with the proposition of the First Assistant Postmaster General, in his letter of the 6th November, 1845; that this letter contained the offer as a part of the proposition to expedite the mails to Cincinnati in time for the morning boat, and upon no other consideration; that the service was of no use to the department, except to enable the contractors to give the desired expedition to Cincinnati, and that nothing would have been paid at any time for the double line, except for that object, as one

daily line could take all the mails, as had been done before. He argues that their position, that they were fined for not delivering in schedule time the mails by the second line, and ought, therefore, to be paid for the service, is not sound, because they were bound to deliver the mails at specific times by one line of coaches, and if they chose to divide the mails and send them by two coaches instead of one, so as to give room for passengers in each line, they had the right to do so ; but if either line failed to deliver the mails, or any part of them in schedule time, the contractors were justly liable to the department for the failure, and were properly fined.

The material point in the case is, whether the proposal by the department that the claimants should carry the mail by a second line of coaches from Zanesville for the sum of \$1,200 per annum was an independent proposition, a compliance with which would entitle the claimants to the specific compensation, or whether it was merely a part of the general plan of the department for expediting the mail so that it should reach Cincinnati in season for the morning boat. If it were the former, the claimants would be entitled to the compensation, as they performed the service. If it were the latter, they would not be entitled to compensation, although they performed the service, because they did not transport the mail to Cincinnati in time for the morning boat.

Our opinion is, that the views of Mr. Johnson were correct. Although the department reserved the right to order this second line, it was never done except in connexion with the plan for expediting the mail, and as dependent upon it. It was proposed by the department merely as an inducement to increased expedition. It was substantially an offer to give the contractors \$1,200 per annum for running the second line if they would expedite the mails so as to reach Cincinnati in sufficient season for the morning boat. It was a conditional and not an independent offer; and as the condition was not complied with the claimants have no cause of action against the United States.





IN THE SENATE OF THE UNITED STATES.

JULY 23, 1856.—Read and referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

WILLIAM NEIL AND OTHERS *vs.* THE UNITED STATES.

1. The petition of the claimants.
2. Documents presented by the claimants as exhibits in the case.
3. Opinion of the Court unfavorable to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this tenth day of July,  
[L. s.] A. D. 1856.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

IN THE UNITED STATES COURT OF CLAIMS.

WILLIAM NEIL, WILLIAM S. SULLIVANT and DARIUS TALLMADGE, for the use of "The Ohio Stage Company," *vs.* THE UNITED STATES.

*To the honorable the Court of Claims of the United States:*

Your petitioners respectfully represent: That on and prior to the 6th November, 1845, they were contractors with the Post Office Department for carrying the mails from Wheeling, Virginia, via Zanesville, Columbus, and Xenia, to Cincinnati. That by the terms of the several contracts covering this service, they were required to convey the mails in two lines of coaches daily between Wheeling and Zanesville, and in one line only between Zanesville and Cincinnati, to arrive at Cincinnati by 6 o'clock p. m., but reserving to the department the right to order on a second line of coaches between Zanesville and Columbus, at an additional compensation of \$1,200 per annum.

was a Spanish subject, and an inhabitant of East Florida, then a Spanish province and dependency of the crown of Spain; that during the said years 1812 and 1813, while a state of peace existed between the United States and Spain, East Florida was invaded by the military and naval forces of the United States, acting under the orders and authority of the government of the United States; that the said invasion was in open and acknowledged violation of the law of nations, and of the treaty then existing between the two governments; that the most wanton and indiscriminate destruction of the property of the Spanish officers and Spanish inhabitants was occasioned by the operations of the American army in East Florida during those years; that, for the purpose of securing to the sufferers that full indemnity for those injuries which the law of nations authorized Spain to demand, the following provision was inserted in the 9th article of the treaty concluded between the United States and Spain, on the 22d day of February, 1819, viz:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants by the late operations of the American army in Florida."

The Spanish version of this article does not contain the word "*late*," but reads simply, "*by the operations of the American army in the Floridas*."—(*Statutes at Large*, vol. 8, p. 260.)

By this clause of the treaty the United States became solemnly bound to give the claimants an opportunity to "establish" their claims (*i. e.*, both the fact of injury and the amount of the injury) *judicially*, and to satisfy, by payment, the amount which should be so established. That Congress so understood the obligations of the treaty, is proved by the provisions of the acts passed to carry it into effect.

The first act was passed on the 3d March, 1823, and is entitled "An act to carry into effect the ninth article of the treaty concluded between the United States and Spain," &c.—(3 *Statutes at Large*, p. 768.)

The 1st section of this act directed the federal judges in Florida, (previously appointed and commissioned as *judges* according to the Constitution, and possessing a full federal jurisdiction in all cases arising under the Constitution and laws of the United States,) "within their respective jurisdictions," to receive and adjust these claims "agreeably to the provisions of the 9th article of the *treaty* with Spain."

The 2d section required the judges to report their decisions, when *in favor* of the claimants, (not otherwise, decisions *against* them being *final*.) to the Secretary of the Treasury, with the evidence, to enable him to see that they were "within the provisions of the *treaty*," (or "just and equitable within the provisions of the *treaty*," which is the same thing;) and if they were found to be so, he was required to "pay THE AMOUNT THEREOF"—nothing more, and nothing less—out of any money in the treasury not otherwise appropriated.

This act is thus expressly declared, on its face, to be auxiliary and subsidiary to the *treaty*. By the 1st section, the claims are to be ad-

judicated ("established") by the judges in Florida, as the treaty required; and by the 2d section, they are to be *paid* (not adjudged) by the Secretary of the Treasury; and "the provisions of the *treaty*" are made the law by which both are to be governed.

Under this act, Secretary Crawford held that the losses occasioned by General Jackson's entrance into West Florida, in 1814, to expel the British and Indians, being justified by the law of nations during our war with England, were not within the 9th article of the treaty of 1819 with Spain; and Secretary Rush having applied this decision to the losses of 1812 and 1813 in East Florida, Congress, on the 26th June, 1834, passed an explanatory act, entitled "An act for the relief of certain inhabitants of East Florida."—(6 *Stat. at Large*, p. 569.)

This act was passed to *reverse and correct* the decision of Secretary Rush, that the claims of 1812 and 1813 were not within the treaty. The 1st section of that act directs the payment of the decrees of the judge for losses, in those years, which had been previously made, and rejected by the Secretary, with provisoes to guard against the payment of claims which were not found to be within the provisions of the treaty.

The 2d section authorizes the judge "to receive, examine, and adjudge all cases of claims for losses occasioned by the troops aforesaid, in 1812 and 1813, not heretofore presented to the said judge, or in which the evidence was withheld, *in consequence of the decision of the Secretary of the Treasury that such claims were not provided for by the treaty of February 22, 1819, between the governments of the United States and Spain,*" subject to the provisoes aforesaid, and to the further proviso that the claims should be presented to the judge within one year from the passage of the act.

Under this act, the judge in East Florida proceeded to adjudge the claims for losses of 1812 and 1813, as therein required.

In making his awards or decrees the judge allowed, as the just and proper measure of damages under the law of nations, necessary to fulfil the stipulations of the treaty, the proved value of the property at the time of the injury or loss; and, by way of satisfaction for the further loss of the use, fruits, or profits of the property, whilst wrongfully deprived of them, and of the just satisfaction for them, which the law of nations required; and during the period that no provision of law existed for the presentation and payment of said claims, he added five per cent. interest. by way of damages, and as an equitable measure of damages, to the original value of the property, (being the legal rate of the country,) and made a formal decree that the United States pay the same to the claimants. The decrees thus made *in favor of the claimant* were, as before stated, reported to the Secretary of the Treasury for payment; when *against him*, they were deemed *final*, and were never reported to the Secretary or heard of afterwards.

That when the decrees of the judge, allowing this legal measure of damages under the treaty and law of nations—which governs treaty obligations—were first presented to Secretary Woodbury, in December, 1836, he, instead of paying the *amount of the decree*, as required by the 2d section of the act of 1823, in cases found "*within the provisions of the TREATY,*" claimed the right to go fully into the merits of



the claims upon the evidence reported, and called upon the judge for further evidence whenever he entertained doubt. In regard to the damages decreed for the loss of the use and fruits of the property, it was rejected, in all instances, under the mere *usage* of the Treasury Department in reference to domestic pecuniary demands, (which the government assumes to be always ready to pay,) without any reference to the treaty, the law of nations, or the express directions of the act of 1823, which required the Secretary, when he paid at all, to pay the *amount* of the decree. The claims seem never to have been considered with any reference whatever to the treaty, or the law of nations, until Mr. Secretary Walker's reference to the Attorney General, in 1849. All the previous references related to the mere usage of the department in regard to domestic accounts. Since that period, the *precedent* of Mr. Secretary Woodbury's decision, in 1836, has been set up as a bar to the consideration of these claims under the treaty and the law of nations; and the claims have been referred by the Secretary to Congress, with an opinion of the Attorney General, substantially conceding the correctness of the measure of damages awarded by the judges, but advising the Secretary to adhere to the precedents under the departmental usage until further legislation by Congress.—(See note at the end of the petition.)

The petitioner further represents that, after the passage of the aforesaid act of 26th June, 1834, the said Andrew Atkinson having departed this life, his then administratrix, Mrs. Susan Murphy, filed her petition under oath before the proper judge, setting forth the claim of his estate, amounting to the sum of \$11,294, and all the facts necessary to bring the same within the provisions of the treaty, and within the jurisdiction of the said judge, and in the manner prescribed by law and the rules of the court, and within the time limited by said act of 26th June, 1834; and prayed that said claim might be adjudicated by the said judge, and such adequate indemnity awarded as to him might seem reasonable, with interest on the amount of the losses from the date of their occurrence. That the said judge took jurisdiction of the said case, and thereupon such evidence was taken and such judicial proceedings had, that on the — day of August, 1839, the said judge made his final decree in favor of said estate, for the sum of \$3,800, with an interest of five per centum per annum from the 10th day of May, 1813; which decree and proceedings, with the evidence, duly certified by the said judge on the 15th day of August, 1839, were immediately reported by him to the Secretary of the Treasury for payment, as provided by law—all of which will fully appear by the record remaining on file in the Treasury Department, and for which this honorable court is respectfully requested to call, as the Secretary of the Treasury declines furnishing the same, or even a certified copy thereof, to the petitioner, until such call shall be made by this honorable court.

That on the receipt of the said record and proceedings at the Treasury Department, payment in full of the said decree was demanded on behalf of the said estate, but the Secretary of the Treasury, the Hon. Mr. Woodbury, applying the principles and practice hereinbefore set forth, refused such payment in full, though all the items of claim

embraced by the decree were conceded to be within the provisions of the said treaty ; but on the 28th day of November, 1839, he approved and directed the payment of the sum of \$2,300, that sum being as much of the award or decree of the judge as he deemed just and proper ; and that amount was accordingly paid on or about the 29th day of November, 1839.

That afterwards, in the year 1852, the then Secretary of the Treasury referred the question of the right of said estate to the payment of the residue of the said sum of \$3,800, decreed as the original value of the property, to the Solicitor of the Treasury, for a report thereon. That on the 9th of March, 1852, the said Solicitor made a report in favor of such payment ; upon consideration of which report, and of the case, the said Secretary directed payment of the further sum of \$1,500, being the residue of the amount decreed by the judge as the original value of the property ; and that sum was, accordingly, paid on or about the 3d November, 1853. The remainder of the said decree, being the damages awarded by said judge under the name of interest, for the loss of the use and fruits of the property, in strict accordance with the obligations of the said treaty, was again rejected under Mr. Woodbury's precedent of applying departmental usage in cases of pecuniary domestic accounts to cases arising under a treaty stipulating "satisfaction" for injury to property, instead of the law of nations, which alone governs such cases, and still remains due and unpaid. All which will appear by the record of the action of the Secretaries in this case remaining on file in the Treasury Department, and which the petitioner prays may be called for by this honorable court, for the reasons before stated, in relation to the judicial record.

The petitioner therefore begs leave to represent to this honorable court, that though two learned Attorneys General, a learned Solicitor of the Treasury, and the judge of the district court of the United States for the northern district of Florida, upon a full review of all the questions involved in this case, and others of the same class, have decided that the measure of damages decreed by the judge in this case is the just and proper one to which the claimants are entitled under the treaty and law of nations, and under the acts of Congress passed to carry the treaty into effect, and have conceded the error of Mr. Woodbury in applying the departmental usage to treaty cases instead of the law of nations ; and though every former Secretary and Attorney General who has acted on these cases has united in this opinion, still the erroneous rule established by Mr. Woodbury, in violation of the treaty, the acts of Congress, and the law of nations, has been holden to be binding upon his successors until Congress should interpose. That the acts passed to carry the treaty into effect have been construed without reference to the treaty, and in such a manner as to defeat the very object for which they were passed ; that the law which is conceded to govern these cases, and by which the legality and justice of the judge's decree in this and the other cases are to be decided, has never been applied to them ; that the claimants do not ask the payment of the damages decreed under the name of interest, on the ground on which its payment is prohibited by the usage of the Treasury Department, but as a part of the actual damages de-

creed and reported by the judge, and which the treaty and acts bind the United States to pay as imperatively as the original value of the property, and the payment of which the usage of the department does not touch.

The petitioner therefore respectfully represents to this honorable court that the estate of her intestate hath obtained, "by process of law," a just and valid judgment, establishing the amount of the injury occasioned by the operations of the American army in East Florida to said estate, in the years 1812 and 1813 ; which, by the treaty and acts of Congress before stated, the Secretary of the Treasury was required to pay, and which the government is still bound to pay : 1. Because the Secretaries of the Treasury, by their approval and payment of the whole amount decreed by the judge as the original value of the property at the time of its loss, have themselves affirmed the right of the claimant, under the acts passed to carry the treaty into effect, to the payment of the whole amount of said decree. 2. Because the said decree, being thus shown, by the evidence reported, to be "within the provisions of the treaty," and consequently within the jurisdiction of the judge, was final and conclusive, and the Secretary was expressly directed to "pay the amount thereof out of any money in the treasury not otherwise appropriated." 3. Because the portion of the decree which remains unpaid is right and just, and an essential part of the "satisfaction" for which the treaty stipulated ; and because the measure of damages decreed by the judge is in accordance with the rule of satisfaction uniformly recognized by the United States in their diplomatic intercourse, and in the construction of their treaties with other nations containing similar stipulations ; and is uniformly sanctioned as the only just rule by every source of authority, whether elementary, judicial, or diplomatic ; and is, in fact, the most modified rule of satisfaction for injury to property known to the common, civil, or public law.

The petitioner therefore prays this honorable court to make a decision and judgment, recognizing the right of the estate she represents to the residue of the decree made in its favor as aforesaid, and for such damages, by reason of its non-payment by the Secretary of the Treasury, as to the court may seem right and just ; and, as in duty bound, she will ever pray.

She further saith that no part of said claim hath been assigned or alienated, but that the same is the property of said estate.

LETITIA HUMPHREYS,

*Administratrix of Andrew Atkinson, deceased.*

CHAS. E. SHERMAN, *Attorney.*

COUNTY OF WASHINGTON, }  
District of Columbia. }

Personally appeared before the undersigned, a justice of the peace in and for the district and county aforesaid, the above named Letitia Humphreys, who having been first duly sworn, deposeth and saith that the foregoing petition is true to the best of her knowledge and

belief. She further saith that no part of the claim set forth in the foregoing petition hath been assigned or alienated, but that the same is the property of the estate of the said Andrew Atkinson, deceased.

Subscribed and sworn to before me this ninth day of July, 1855.

HENRY REAVER,

*Justice of the Peace.*

NOTE.—The claim of Andrew Atkinson is one of a class which will be found fully set forth in a report of the Secretary of the Treasury to the Senate, being Ex. Doc. No. 82, 1st session 33d Congress.

For the action of Congress on said claims see the report of the Judiciary Committee of the House of Representatives, being *report No. 33, 2d session 33d Congress, in the case of Robert Harrison*. See also report of the Judiciary Committee of the Senate, dated 24th day of February, 1851, *in the case of John Forbes*.

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*Claim of Susan Murphy, administratrix of the estate of Andrew Atkinson, deceased ; \$2,300 allowed.*

TREASURY DEPARTMENT, November 28, 1839.

In the within claim of Susan Murphy, administratrix of Andrew Atkinson, deceased, a claimant under the 9th article of the treaty with Spain of the 22d of February, 1819, the sum of two thousand three hundred dollars, being as much of the award of the judge of the superior court of east Florida as is deemed just and proper, is *approved*, without interest, in virtue of power vested in me by the act of the 26th June, 1834, entitled "An act for the relief of certain inhabitants of east Florida." The case is therefore referred to the First Auditor for settlement.

LEVI WOODBURY,

*Secretary of the Treasury.*

First Auditor's office, November 28, 1839.

A. MAHAR.

Comptroller's office, November 29, 1839.

R. S. BRISCOE.

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*The claim of the administratrix of Atkinson ; \$2,300 allowed.*

Atkinson adandoned his property at the time of the invasion. The value of his usual crop is sufficiently proved, and it is submitted whether under the abandonment, as in previous cases, that portion of the award should be confirmed. The other portion of the losses awarded is sufficiently proved.

Respectfully,

M. C. YOUNG.

See letter, deciding this case, addressed to Davy Levy, esq., November 20, 1839.

TREASURY DEPARTMENT, *September 11, 1839.*

The abandonment of the plantation to which Mr. Young refers appears, by the general scope of the testimony, to have taken place after the destruction of the property at the Ship Yard, as proved by the testimony of John Uptegrove, who states that he resided in the family. The loss of the horses would seem from the testimony to apply to those at Prechen, and not at the Ship Yard. Uptegrove states that he knows of the loss of but one horse, and that belonged to the Prechen plantation. This item ought therefore to be rejected, as an allowance is believed to have already been made for the loss of horses at the place mentioned, in the case of Jane Atkinson, recently decided. With this deduction, I think the claim ought to be allowed, with the exception of interest.

G. R.

P. S.—On re-examination of the case of Jane Atkinson, it is found that no claim was made for horses, nor was anything allowed on that account.

G. R.

TERRITORY OF FLORIDA, }  
County of St. John's. }

*To all to whom these presents shall come, greeting :*

Whereas, Susan Murphy, of the county aforesaid, hath been duly appointed and qualified according to law to act as administratrix of all and singular the goods and chattels, rights and credits of Andrew Atkinson, late of said county deceased, and hath entered into bond obligatory to the governor of the Territory of Florida and his successors in office, jointly and severally with William H. Simmons, Thomas Douglas, and David Levy, in the penal sum of seven thousand dollars, conditioned for the faithful performance of her duties as administratrix aforesaid. Now know ye that administration of all and singular the goods and chattels, rights and credits, of the said Andrew Atkinson, deceased, is hereby granted unto the said Susan Murphy. Witness the honorable Elias B. Gould, judge of the county court, for the county and Territory aforesaid, this 29th day of September, A. D. 1834.

BERNARDO SEGNI, *Clerk C. C.*  
Per SECUNDINO J. SEGNI, *Deputy.*

TERRITORY OF FLORIDA, }  
St. John's County. }

I, Bernardo Segni, clerk of the county court for the county aforesaid, hereby certify the foregoing to be a true and correct copy of its original on file in my office, and recorded in Wills Book C, page 261.

[SEAL.] Given under my hand and seal of office at the city of St. Augustina, Territory of Florida and county aforesaid, this twenty-ninth day of March, in the year of our Lord one thousand eight hundred and thirty eight.

BERNARDO SEGNI, *Clerk C. C.*

## EAST FLORIDA.

*To the Hon. Robert Raymond Reid, judge of the superior court for the eastern district of Florida, and specially appointed to receive, hear, and adjudge claims for losses occasioned by the United States troops in East Florida during the years one thousand eight hundred and twelve and one thousand eight hundred and thirteen :*

Susan Murphy, administratrix of the estate of Andrew Atkinson, in his lifetime—to wit, in the years 1812 and 1813—was subjected to the following losses and damages by the acts of the United States troops and their confederates in the then province of East Florida, to wit :

Two hundred bushels of corn, worth.....	\$200 00
Five thousand pounds cotton in the seeds, at \$8 per 100...	400 00
Various farming utensils, worth.....	50 00
Three horses of the value of.....	300 00
Four head of cattle.....	60 00
Sixty-six head of hogs, worth.....	198 00
Two canoe boats.....	150 00

The destruction of all the buildings, grove, and other improvements at plantations, Prechen, and Ship Yard, by fire and otherwise, valued as follows, to wit :

Dwelling-house, worth .....	2,000 00
Kitchen, negro houses, cotton and corn houses, and other plantation buildings.....	1,000 00
One cotton gin of a (then) late invention.....	200 00
Orange grove.....	3,000 00
The crop of the years 1812 and 1813.....	3,000 00
The cost of supporting the negroes of the estate during the years 1812 and 1813, in which years they could not, on account of the disturbances in the country and violence committed by the hostile troops occupying the same, be employed .....	600 00
House rent during the same time, the dwelling of the said Atkinson having been destroyed, and he being compelled to hire a house for the shelter of his family.....	136 00

Amounting in all to the sum of..... 11,294 00

Say eleven thousand two hundred and ninety-four dollars.

That the above detailed losses and damages occurred in the years 1812 and 1813, and were occasioned by the United States troops and their confederates.

That no indemnity, remuneration, or compensation of any nature whatever hath ever been made therefor to the said Andrew Atkinson, nor, since his death, to his representatives.

That said losses occurred subsequently to the appearance of the troops and agent of the United States in East Florida.

That the said Andrew Atkinson was at the time, and ever continued, a faithful Spanish subject, active and true in the discharge of his alle-

giant duties. And that no claim for the said losses has been before presented to the judge of this district.

Wherefore, and in consideration of the premises, it is, with submission, asked that such adequate indemnity may be awarded as to your honor may seem reasonable, and the act of Congress providing therefor may justify. Interest on the amount of loss from the date of its occurrence being allowed, if it be deemed proper to be so.

SUSAN MURPHY,  
*Administratrix.*

ST. JOHN'S COUNTY, ss.

Before me personally appeared Susan Murphy, whose signature appears above, and made oath that the account for losses sustained in the foregoing petition is correctly stated according to the best information of which she has been able to possess herself.

Sworn to and subscribed before me this — day of June, A. D. 1835.

Sworn statement that I, Don Andres Atkinson, make of the injuries and losses occasioned me by the rebels during the insurrection of the years 1812 and 1813, aided by the troops of the line of the United States of America.

In the year 1812 the rebels possessed themselves of my plantation upon the river St. John's, from whence they took several articles of provisions, the loss of which I value as follows :

Two hundred bushels of corn.....	\$200 00
Five thousand pounds seed cotton, at \$8 per cwt.....	400 00
Various farming utensils.....	50 00
Three horses.....	300 00
Five head of cattle.....	60 00
Sixty-six head of hogs.....	198 00
Two canoe boats.....	150 00

In the year 1813 the rebels, commanded by one William Cone, a citizen of the United States of America, put fire to all the improvements I had upon my plantations, called Prechen and Ship Yard, which loss I value as follows :

A house for my dwelling.....	2,000 00
Kitchen and other houses for lodging my negroes in, and the deposit of my crops.....	1,000 00
The cotton gin for cleaning cotton.....	200 00
One orange grove.....	3,000 00
The crop of 1812.....	1,500 00
Do. that of 1813.....	1,500 00
The support of my negroes during the years 1812 and 1813.....	600 00
House rent.....	136 00

Total dues..... 11,294 00

FERNANDINA, January 1, 1817.

ANDREW ATKINSON.

We, the undersigned, do declare all contained in this statement to be true, of which we have a good deal of knowledge.

GEORGE J. F. CLARKE,  
CHARLES W. CLARKE.

I certify the foregoing to be a true and correct translation of the Spanish document.

JOSEPH S. SANCHES,  
*Pr. and Tr. Superior Court, E. D. F.*

EAST FLORIDA, *St. John's County.*

Upon the application of Susan Murphy, administratrix, you are hereby appointed to take the depositions of John Uptegrove, Francis Richard, Bethune, and Seymour Pickett, in answer to the interrogatories annexed ; and you are required to return the said interrogatories with the depositions when taken, and this order, to the judge of the superior courts for the district of east Florida.

Dated this 28th day of July, 1835.

ROBT. RAYMOND REID,  
*Judge Superior Courts D. E. F., and Commissioner.*  
GURNEY SMITH, Esq.

*Claim in behalf of the estate of Andrew Atkinson, deceased, for losses sustained in east Florida in the years 1812 and 1813.*

Interrogatories to be propounded to John Uptegrove, Francis Richard, sr., David Turner, Jesse Turner, Farquhar Bethune, and Seymour Pickett, all of Duval county. Witnesses to be examined at the instance and in behalf of the petitioner :

1. Your age?
2. Did you know Andrew Atkinson? Was he a Spanish subject in the beginning of the year 1812: and did he remain faithful and true to his allegiant duties during the disturbances of that and the subsequent years?
3. Did you know, at the time, of the destruction of the two plantations Prechen and Ship Yard, the latter of which was owned, and both occupied, by the said Atkinson? If you do, state when they were destroyed, how, and by whom, and where said plantations were situated.
4. If said places were destroyed, state, if you please, if all the buildings on the Ship Yard plantation were destroyed, and of what said buildings consisted, and of what value were they.
5. Do you know if the said Andrew Atkinson lost any corn in store when said places were destroyed, and how much? And whether he lost cotton, also in store, at the same time? and if he did, how much cotton, and at what price was that article selling about the time referred to?
6. Do you know if the farming utensils on said places were de-



stroyed, and at what gross value would you estimate the stock of implements necessary for plantations such as the said places were?

7. Do you know if the said Atkinson lost horses, and how, and how many, and of what value?

8. Did he lose cattle, and how, and how many, and of what value?

9. Did he lose hogs, and how, and how many, and of what value?

10. Do you know of his having lost two canoe boats, and of what description and value were they, and how were they lost?

11. Do you know of a cotton gin lost by said Atkinson at the same time above referred to? On which of said places was the gin? How was it lost, and what was its value?

12. What was the usual annual income of the planting interest of the said Atkinson at his said plantations? What would his crop of 1812 probably have yielded him? Was said crop destroyed? How much ground did he cultivate, and how much of said ground was planted in cotton; how much in corn, potatoes, &c.? How was it destroyed, and when?

13. Was it possible for said Atkinson to have planted a crop with any prospect of reaping it during the year 1813? If not, how was he prevented, or whence proceeded the impediment; of what value ought the crop of that year to have been to him, had the situation of the country permitted him to plant?

14. How many negroes had said Atkinson; how many of them were workers; what became of them after the destruction of Prechen and Ship Yard plantations; was the said Atkinson able to employ them in any profitable or safe manner at any time during the years 1812 and 1813; wherefore could they not have been employed during said years; what would you judge to be a fair monthly charge for the support of a gang of negroes per head during said years—food and clothing; what was the hire of field hands per month, in Florida at the time of the occurrence of the disturbances?

15. Do you know where said Atkinson carried his family after the destruction of their home; was he obliged to hire a house for their shelter; do you know what said house cost him; what number his family consisted of?

16. Were the losses to which you have above testified occasioned by the United States troops, and would they have occurred but for the presence of the troops of the United States in the country?

17. Did they occur before or after the entrance of the agent and troops of the United States into East Florida, and in what year?

18. Has the said Atkinson, or his representatives, ever been indemnified for said losses?

19. Are you in any manner interested in this claim; are you related to any of the heirs of Andrew Atkinson's estate; what is your occupation, and what were your opportunities of knowing the nature and extent of the losses of said Atkinson?

20. Was the said Atkinson in a prosperous and comfortable situation when the disturbances broke out; what became his situation afterwards; what is the present situation; to what do you attribute the misfortune of that condition?

LEVY,  
*For Petitioner.*

*Cross-interrogatories.*

1. Have you an interest, direct or indirect, in this claim?
2. Do you speak of the property mentioned in the direct interrogatories from hearsay or from your own information and knowledge?
3. Is your memory good, and are you certain the petitioner *sustained losses*? If you say he did sustain losses, be pleased to say, if on know of your own knowledge, what was lost; make out, in your reply to this question, an accurate statement of the property lost by petitioner. If you make out such a statement, say, if you know of our own knowledge, the value of the property lost. If yes, state the value of each particular piece of property contained in your statement?
4. Be so good as to state the particular time when the losses occurred, and say by whom they were occasioned—by patriots, United States troops, Spaniards, Indians, or by whom; were you present when they occurred?
5. Tell all you know about this claim, whether for or against it.

ROBERT RAYMOND REID,

*Judge Superior Courts District of East Florida.*

*Answers to interrogatories.*

John Uptegrove, a witness produced on the part of the claimant being duly sworn according to law, deposes and says:

1. To the first interrogatory deponent answers: That he will be seventy-two years old on the fifth day of August next.
2. Deponent states that he knew Andrew Atkinson; that he was a Spanish subject in the year 1812; that he continued faithful to his allegiance during the disturbances of 1812 and 1813.
3. Deponent answers, yes; the said plantations were destroyed in the latter part of the year 1812; they were burnt by the United States troops and their allies. Prechen was situated on the St. John's in about fifteen miles from the bar; the Ship Yard was situated near St. John's bluff, or about ten miles from the bar.
4. All the buildings at the Ship Yard were destroyed, viz: a dwelling house, cotton house, stable, gin house and houses for slaves; can't say precisely as to the value, but thinks they were worth one thousand dollars.
5. Deponent answers, yes; he (deponent) saw it in the gin house; there was a considerable quantity, but can't say how much; he also lost a considerable quantity of cotton; can't say how much; it was selling at that time for 50 cents, say fifty cents per pound.
6. Deponent answers, yes; they were probably worth one hundred dollars.
7. Deponent answers: knows of but one horse lost; it was taken by the United States troops from Prechen; it was worth sixty or seventy dollars.

8. Deponent states that he lost cattle and hogs; he can't say how many or their value.

9. Deponent refers to the foregoing answer, viz: that he lost hogs, but can't say how many nor their value.

10. Deponent cannot say.

11. Deponent answers yes; it was at the Ship Yard; it was burnt in the cotton house; it was worth two hundred dollars.

12. Deponent states that his annual income from the plantation was about two thousand dollars; his crop of 1812 would have yielded him two thousand dollars; it was burnt and destroyed; can't say precisely how much ground he cultivated; but thinks it was about fifty acres; about thirty acres were in cotton, and the remaining twenty in corn and potatoes; it was destroyed in 1812, by fire.

13. Deponent answers, yes; but he was prevented by the United States troops; his crop in that year, viz: 1813, ought to have brought him two thousand dollars if the situation of the country had been peaceable.

14. Deponent says: the United States troops took away five negroes when they set fire to the buildings; he was not able to employ his hands in a safe way in 1812 and 1813; he could not employ them in consequence of the state of the country, by reason of the invasion; can't say what it would have cost to clothe and feed them per hand; can't say what the hire of field hands was at that time, as there were no negroes hired.

15. Deponent states that Atkinson took his family after the destruction of his property to Amelia island, and afterwards to Darien; he rented a house in Fernandina, but can't say for how much; his family consisted of his wife, two sons and two daughters.

16. Deponent answers, yes; that said losses would not have occurred in the absence of the troops.

17. Deponent states that the losses occurred after the entrance of the agent and troops of the United States in 1812 and 1813; principally in the year 1812.

18. Deponent states, not to his knowledge.

19. Deponent answers, no; nor is he at all related to Atkinson or his representatives; deponent is a blacksmith by trade; he worked for them and lived with them.

20. Deponent states that he was in easy and comfortable circumstances before the disturbances broke out; he became very poor afterwards; his family are now very poor and dependent on their friends; deponent attributes their present impoverished state to the losses which they sustained by means of the invasion of the United States troops.

*Cross-interrogatories answered.*

1. To the first cross-interrogatory deponent answers "No."

2. Deponent states that he speaks from his own actual knowledge, having resided for several years in the family.

3. Deponent answers, yes; that he is certain. Deponent further states, from his own knowledge, he lost all the buildings on Prechen

Place and the Ship Yard, viz: a two story frame house at Prechen, with two brick chimneys, kitchen, store house, and corn house; also, an orange grove. He lost, at the Ship Yard, a dwelling log house, cotton house, stable, houses for slaves, gin house, cotton gin. One horse at Prechen, a few cattle, hogs, farming utensils. His crops of cotton and corn, potatoes, &c., and sundry articles in the gin house; five negroes. Deponent estimates the losses sustained, at a reasonable rate, to be seven thousand dollars.

4. Deponent states that the said losses were sustained in the years 1812 and 1813; they were occasioned by the United States troops and their allies. Deponent was not present, but he saw the smoke issuing from their houses.

5. Deponent says he knows nothing further for or against it.

JOHN UPTEGROVE.

Sworn to and subscribed to before me this 28th day of July, 1835.

GURNEY SMITH, *Com.*

ESTATE OF ANDREW ATKINSON }  
*vs.* } Claim for losses in 1812 and 1813.  
 THE UNITED STATES. }

TERRITORY OF FLORIDA, *Duval County:*

Francis Richard, a witness on the part of the claimant in the above case, being duly sworn, deposes and says, to wit:

To the direct interrogatories:

1. The first witness answers and says: That he is fifty-nine years of age.

2. Witness answers: That he knew Andrew Atkinson. Andrew Atkinson was a Spanish subject in the beginning of 1812, and remained faithful to his allegiance during said disturbances in that and subsequent years.

3. Witness answers: That Andrew Atkinson claimed and was in possession of a place called "Ship Yard," situated on the east side of St. John's river, above St. John's bluff. Prechen was owned by Mrs. Jane Atkinson, and she lived at Prechen. Prechen was destroyed in 1813. By hearsay, witness knows that Ship Yard was also destroyed at the same time.

4. Witness answers: That he was not on Ship Yard from the beginning of 1812 to the summer of 1816. At this latter time the place was totally destroyed—destroyed many years. He has no doubt, from the general report at the time, that the buildings on Ship Yard were destroyed in 1813. The buildings on Ship Yard were, one frame gin house, two stories high; one cotton house, with two frame sheds; one corn house, with two frame sheds; a dwelling house, kitchen, store house, and negro houses. The whole were worth, in witness' opinion, from fifteen hundred to two thousand dollars.

5. Witness answers: He can state nothing in answer to this inter-

rogatory, of his own knowledge; from what he heard at the time he believes said Atkinson had cotton, corn, and peas in store when the buildings were burned; what quantity cannot say; cotton was at that time, 1812 and 1813, selling at from 50 to 62½ cents per pound.

6. Witness answers: That he does not know.

7. Witness says: He knows nothing of the horses.

8. Witness says: He knows nothing of the cattle.

9. Witness says: Atkinson had hogs, but how many he cannot say; does not know that Atkinson lost them, but believes so from heresay.

10. Witness says: He knows nothing of the boats.

11. Witness says: He often heard Atkinson speak of his cotton gin, of a new invention, but witness never saw the gin; it was, he believes, at the Ship Yard.

12. Witness says: He does not know.

13. Witness says: There was no security to the planting interest in East Florida, on account of the confused state of the country in 1813, caused by the United States troops.

14. Witness says: He does not know how many negroes Atkinson had, nor how many workers; does not know what became of them; but was told that one William Cone, a citizen of Georgia, at the head of a party, took about five of his negroes and sold them in Georgia; witness thinks Atkinson could not have employed safely his negroes in any business on the St. John's river, at Ship Yard, or any other place on said river; he could not because of the disturbed state of the country by United States troops and their allies; the expense to find and clothe a gang of negroes, at that time, would be at least twenty-five dollars per head per year; by the year, field hands were worth ten dollars per month; axemen were worth from fifteen to twenty dollars per month.

15. Witness says: Atkinson carried his family to Cumberland island, Georgia; Dr. Bayard's plantation was hired for them; does not know the cost, nor the number of which his family consisted; witness paid four hundred dollars per year for a house and place on the main land, fronting said island, for his own family.

16. Witness says: That he does not believe said Atkinson would have sustained said losses had they not been occasioned by the United States troops and their presence in the country.

17. Witness says: He believes the losses of Atkinson occurred after the entrance of the agent and troops of the United States into East Florida; he believes the losses occurred in 1813.

18. Witness says: Not to his knowledge or belief.

19. Witness says: He is not interested in this claim; he is not related to any of the heirs of said Atkinson; planter; opportunities as to Ship Yard unfavorable.

20. Witness answers: The condition of Atkinson and family was then prosperous and comfortable; his situation afterwards was distressing; the present situation of Mrs. Atkinson is by no means comfortable; I attribute the dependent and reduced circumstances to the losses occasioned by the disturbances in East Florida.

*Answers to the cross-interrogatories.*

1. To the first, witness says: He has no interest in this claim.
2. Witness says: He speaks of the property from knowledge; as to its destruction, he speaks from hearsay.
3. Witness says: That his memory is good. He has no doubt that said Atkison sustained losses; but does not know, of his own knowledge, what he lost.
4. Witness says: He cannot state the time more particularly than he has done; was not present when the losses occurred.
5. Witness says: That he knows nothing more than what he has already stated.

F. RICHARD.

Subscribed and sworn before me, this 22d day of May, A. D. 1837.

R. B. GREGORY,  
*Commissioner.*

*Answers to interrogatories.*

ESTATE OF ANDREW ATKINSON,	}	Claim for losses, 1812 and 1813.
<i>vs.</i>		
THE UNITED STATES.		

Farquhar Bethune, a witness, produced by Susan Murphy, administratrix of Andrew Atkinson, deceased, being duly sworn according to law, deposes and says, to wit:

To the direct interrogatories, to wit:

1. To the first interrogatory witness answers: That he is about fifty-four years of age.
2. Witness answers: That he was well acquainted with Andrew Atkinson in 1812, and Atkinson remained faithful to his allegiance in 1812 and 1813, so as it is known to witness.
3. Witness answers: That in 1812 and previously, said Atkinson resided at Prechen, on the River St. John's, opposite Dame's point. Witness believes that Mrs. Atkinson, the wife of Andrew Atkinson, owned Prechen. Witness does not know anything of the Ship Yard. The buildings at Prechen were burned in 1813 by United States troops, or rebels, when they were evacuating the province.
4. Witness answers: That he knows nothing in relation to the Ship Yard.
5. Witness answers: That he knows nothing.
6. Witness answers: That he knows nothing.
- 7, 8, 9, 10, 11. To the seventh, eighth, ninth, tenth, and eleventh interrogatories, witness answers: That he knows nothing in relation to the subjects inquired about.

12. Witness answers: That said Atkinson, he knows, planted cotton and provisions previous to, and in, 1812; does not now recollect his force; crops at that time were usually valued at one hundred and fifty dollars per each taskable hand; no crops were gathered in 1812 by any planters on St. John's river.

13. Witness answers: That it was not possible for said Atkinson to have planted a crop in 1813 with any prospect of reaping it; he was prevented from planting by the country being in the possession of the United States troops.

14. Witness answers; That field hands in 1812 were worth from ten to twelve dollars per month for plantation work; men to be engaged in cutting timber were worth from sixteen to twenty-five dollars per month. The support of a *gang of negroes* in 1812 and 1813, per hand, would, witness thinks, cost from twenty-five to thirty dollars per annum.

15. Witness answers: That he knows said Atkinson carried his family to Amelia island in 1812 and 1813. He hired a house at Fernandina to shelter them. Witness does not know what the house cost said Atkinson. His family consisted of himself, his wife, and three children. Witness does not recollect the number of slaves.

16. Witness answers: That no losses would have occurred in 1812 and 1813 but for the presence of the United States troops in East Florida.

17. Witness answers: That all the losses of 1812 and 1813 occurred after the entrance of the agent and troops of the United States in March, 1812.

18. Witness answers: That he has no reason to believe that said Atkinson or representatives have been indemnified for their losses.

19. Witness answers: That he has no interest in this claim. Witness is not related to any of the heirs of Andrew Atkinson. Witness is a planter. Witness was well acquainted with Andrew Atkinson, and knows that he suffered great losses; he regrets that he cannot now speak as to the particulars.

20. Witness answers: That said Atkinson was comfortably situated at Prechen, in 1812 and 1813; by the rebels and United States troops.

*To the cross-interrogatories.*

1. To the first cross-interrogatory: Witness answers: That he has no interest whatever in this claim.

2. Witness answers: That so far as he has answered to the interrogatories he speaks from his own knowledge.

3. Witness answers: That his memory is good enough to remember that said Captain Andrew Atkinson, or his family, sustained considerable losses in 1812 and 1813. Witness can state nothing more than he has already said in the direct interrogatories. Witness thinks the house burned at Prechen was fully worth \$2,500, without furniture.

4. Witness answers: That the house was burned about the 5th or

6th of May, 1813, either by the patriots or the United States troops when they were evacuating the country.

5. Witness answers: That he knows nothing more than he has already stated.

FARQUHAR BETHUNE.

Subscribed and sworn to this 5th day of January, A. D. 1837, before me.

R. B. GREGORY,  
*Commissioner.*

<p>SUSAN MURPHY, administratrix of ANDREW ATKINSON, <i>vs.</i> THE UNITED STATES.</p>	}	<p>Claim for losses in 1812 and 1813.</p>
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TERRITORY OF FLORIDA, *Duval County, to wit:*

Seymour Pickett, a witness produced in behalf of the claimant in the above case, being duly sworn, according to law, deposes and answers, to wit:

To the direct interrogatories, to wit:

1. To the first interrogatory witness answers: That he is seventy-four years of age.

2. Witness answers: That he knew Andrew Atkinson in 1812; he was a Spanish subject, and was commandant military on the St. John's river, and had been some years previous to that time, and was some years subsequent thereto.

3. Witness answers: That the plantation called Prechen was on the St. John's river, opposite Dame's Point; the plantation, Ship Yard, was on the same side of the river, below Prechen, adjoining St. John's bluff; they were destroyed; from the best information derived at the time, he believes they were plundered and burnt by Alexander, who commanded a party of the patriots.

4. Witness answers: That he understood and believes all were destroyed; there was an excellent story-and-a-half frame house, well finished and very comfortable; there were out-houses, usual on plantations, but never noticed them particularly; cannot state their value, but is of opinion that the buildings he saw there could not have been put up for less than one thousand dollars—in fact, thinks this valuation rather low.

5. Witness answers: That he knows nothing of Atkinson's corn and cotton.

6. Witness answers: That he does not know; he knows that said Atkinson came, when he abandoned his plantation, to Amelia Island, with his negroes, and had no farming utensils for them to work with; he understood at the time, and believes, that all his corn, cotton, and farming utensils, were destroyed; can form no estimate of their value.



7. Witness answers : That he does not know of the loss of horses.

8. Witness answers : That he does not know of the loss of cattle.

9. Witness answers : That he does not know of the loss of hogs.

10. Witness answers : That he does not know that Atkinson had boats.

11. Witness answers : That he does not know what became of the gin ; knows he had one on the plantation Ship Yard ; the common price of a cotton gin was one hundred dollars.

12. Witness answers : That he understood the crops of said plantation were destroyed, and destroyed in the fall of 1812. To the other particulars of this interrogatory witness is unable to give answers.

13. Witness answers : That he does not think it was possible for said Atkinson to have planted in 1813 with a prospect of reaping ; prevented by the troubles occasioned by the entrance of the United States troops into Florida ; can't say of what value the crop would have been.

14. Witness answers : That he does not know how many negroes Atkinson owned, nor how many of them were workers ; they were, after the destruction of said plantations, taken to Amelia island ; does not think he was able to employ them profitably ; knows that when he first came to Amelia his negroes were employed on the public works, for no compensation but their rations—were thus employed for two or three months ; how they were employed after that time witness does not know ; they could not have been profitably employed, on account of the disturbed state of the country, occasioned by the United States troops and their allies ; there was no safety in the country ; the fair monthly charge for the support of a gang of negroes would be two dollars per hand ; the hire of a negro at that time, for plantation, was ten dollars per month ; witness was at that time superintendent of the public works then being constructed on Amelia Island, and had six able-bodied negroes belonging to Atkinson at work for him, for their rations ; Atkinson had more negroes, but how many more witness does not know.

15. Witness answers : That he carried them to Amelia Island ; supposes he was obliged to hire a house for their shelter ; does not know what said house cost ; Atkinson's family consisted of his wife, two daughters, and one son, then living with him.

16. Witness answers : That said losses were occasioned by the entrance of the United States troops into the Territory, and would not have occurred but for their presence in the country.

17. Witness answers : that said losses occurred after the entrance of said agent and troops into East Florida, in 1812 and in the beginning of 1813.

18. Witness answers : Not to his knowledge ; does not think they have been indemnified.

19. Witness answers : That he is not interested in this claim ; is not related to any of the heirs of said Atkinson ; his occupation is that of a planter ; was a planter when the disturbances commenced in 1812 ; after he fled to Amelia Island, was put in charge of constructing the public works there ; is a shipwright by trade.

20. Witness answers: That said Atkinson was in a prosperous and comfortable situation when the disturbances broke out in 1812; was a genteel man, and had a genteel family, and lived genteelly and in easy and independent circumstances; afterwards, he lived in low circumstances, entirely dependent on his friends for support; his family was broken up, and went to live with their relations, some with one and some with another; witness attributes the misfortune of their reduced and dependent condition to the loss of property and their being broken up, occasioned by the devastations committed in consequence of the entrance of the United States troops into East Florida.

Cross-interrogatories answered, to wit:

To the first, witness answers: That he has not.

2. To the first cross-interrogatory, witness answers: That he speaks from his own information and knowledge, except when it is expressly otherwise stated in his answers.

3. Witness says: That he thinks his memory is good; and is confident that the petitioner sustained losses, and to a considerable amount; witness knows that the buildings were lost; they were burned; should think them worth at least one thousand dollars or more; knows that the six negroes were Atkinson's, and that they labored on the public works for their rations.

4. Witness answers: That the losses occurred in the latter part of 1812 or early part of 1813; they were occasioned, as witness was told, by some of the party under Alexander; witness was not present when they occurred.

5. Witness answers: That he has told all he recollects.

SEYMOUR PICKET.

Subscribed and sworn to before me, this 31st day of May, A. D. 1836.

R. B. GREGORY, *Com'r.*

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EAST FLORIDA, *St. John's County.*

Upon the application of Susan Murphy, administratrix, you are hereby appointed to take the depositions of Isaiah D. Hart, in answer to the interrogatories annexed, and you are required to return the said interrogatories with the depositions, when taken, and this order to the judge of the superior courts for the district of East Florida.

Dated this 16th of May, 1838.

ROBT. RAYMOND REID,

*Judge Superior Courts, District of East Florida.*

Hon. JOHN L. DOCKETT, Esq.

*In the matter of the claim of the estate of Andrew Atkinson for losses in 1812 and 1813.*

Interrogatories for Isaiah D. Hart :

1. Did you know Andrew Atkinson ; had he a plantation on the St. John's river when the United States troops entered East Florida in 1812?

2. Was his property destroyed by the invading forces?

3. Did he lose 200 bushels of corn ; did he lose cotton in the house, and how much ; if you do not know what particular quantity he had, say if you were familiar with his affairs and frequently on his place, and if, from your knowledge of his planting interest, he probably had on hand a quantity of these articles, and how much would you suppose ; is the quantity of corn charged what he would have been likely to have on hand for his plantation use at the time ; do you know if he had shipped all his cotton of the preceding year's growth?

4. Was his place well stocked with farming utensils ; did he lose any of them?

5. Did he lose horses ; how many ; what were they worth?

6. Had he cattle ; did he lose any, and how many ; hogs, and how many did he lose ; how many had he, do you think ; could he have taken any of them away, or recovered them ; what were they worth?

7. Had he two canoe boats ; what were they worth ; did he lose them?

8. Had he a plantation called Ship Yard ; were there buildings upon it ; enumerate them, and say what they were worth in your opinion ; were they lost?

9. Did Atkinson lose his crops of 1812 and 1813 ; what do you think the crop of each year would have been worth ; if he did not plant in 1812, what prevented ; how many acres of land did he usually plant, and what part in cotton?

10. Where did he carry his negroes when driven from his place ; could he obtain employment for them during the invasion, and what do you think was the cost of supporting them?

11. Do you know if he had to hire a house for the residence of his family and what it cost?

12. Do you think annexed account a fair estimate of his losses?

D. LEVY, *Attorney for petitioner.*

*Statement of losses.*

200 bushels corn.....	\$200 00
5,000 pounds cotton in the seed, at \$8.....	400 00
various farming utensils.....	50 00
3 horses of the value of.....	300 00
4 head of cattle.....	60 00
66 head of hogs.....	198 00
2 canoe boats .....	150 00

*Property destroyed at the Ship Yard.*

Crops of the years 1812 and 1813.....	\$3,000 00
Cost of supporting the negroes of the estate during the years 1812 and 1813.....	600 00
House rent for the family of said Atkinson during those years	136 00

*Cross-interrogatories.*

1. How do you know that Atkinson sustained losses ; who told you so ; how do you know that Atkinson owned property ; how do you know what the value of the property was ?

2. Was Atkinson one of the patriots ; what concern had he in the revolution ; were you related to him ; are you related to the present claimant ?

3. What is your age ; where were you in 1812 and 1813 ; were you one of the patriots ; have you claims for losses ?

4. If you say that losses were sustained by Atkinson, say *when*, *where*, *how*, and *by whom* they were occasioned, and tell all you know whether for or against this claim.

ROBERT RAYMOND REID,  
*Judge and Commissioner.*

ESTATE OF ANDREW ATKINSON	}	Claim for losses in 1812 and 1813.
vs.		
THE UNITED STATES.		

Answers of J. D. Hart, a witness in the above case, to the direct interrogatories :

1. Answer to the first direct interrogatory, witness says: He knew Andrew Atkinson, and that he had two plantations on St. John's river in 1812—one called the Ship Yard, the other Prechen.

2. Witness says: Claimant's property was destroyed in consequence of the operations of the invading forces.

3. Witness says: In 1813 he was on his plantation at the Ship Yard, and he planted there; this is all witness can answer, and all he knows of the matters inquired of in the third direct interrogatory.

4. Witness says: Claimant had the farming utensils, but he don't know what became of them.

5. Witness says: Deceased had three horses and they were taken by the invading army; witness saw a man belonging to the party riding one; they were very pretty horses, but the precise value witness is unwilling to estimate.

6. Witness says: Deceased had cattle, but how many don't know; thinks he could not have carried them off with him; and witness states that he has every reason to believe that he lost both cattle and hogs, but what number of either he don't know.

7. Witness says: Deceased had boats, but he don't know what became of them.

8. Witness says: Deceased had a plantation at the Ship Yard; it had a great many buildings upon it; dwelling house, cotton house, corn house, gin house, kitchen, with other necessary out houses, together with a great number of negro houses; can't tell the value of the enumerated buildings, but says that they were worth a good deal; the property above spoken of was burnt up, and the loss was caused by means of the invading army.

9. Witness says: He thinks deceased lost his crops in the years 1812 and 1813; but how much he planted and how much his crops were worth, annually, witness can't state.

10. Witness says: Deceased was driven from his place by the revolutionary movements of the invading army, and that he carried his negroes to Amelia island; don't believe the negroes could have been hired at this time; all business was stagnant in consequence of the revolutionary war then raging, and witness is well convinced that deceased did incur considerable expense for maintenance of them, but how much can't say.

11. Witness says: He owned no house at Amelia, and, of course, he had to hire, for Atkinson was not a man that would live out doors; but of his rent charge knows nothing.

12. Witness says: He lost property at the Ship Yard and at his other place called Prechen, but how much and the value thereof can't speak.

*Cross-interrogatories.*

1. Witness says: That he was frequently at Prechen and at the Ship Yard and saw the improvements, and was there afterwards and saw the buildings were destroyed, and that it was a matter of public notoriety that they were burnt; has not stated the value of property anywhere, because he did not know its value.

2. Witness says: Atkinson was not a patriot, he had nothing to do with the revolution but to get out of danger of it; is not related to the deceased nor to the present claimant.

3. Witness says: He is forty-five years old; was on St. Mary's river and St. John's, in Fernandina, and before St. Augustine in 1812 and 1813, and was a patriot and is now. Witness says he has a claim for losses through his father's estate.

4. Witness says: He has stated as fully as he can respecting all the losses he has testified concerning, except the houses at Prechen; on this place there was a large two-story house with two chimneys to it, and several other out buildings, all of which were burnt up; did not see them burn, but soon after they were burnt, and saw them before they were burnt, and it was a matter of public notoriety when they were burnt, and by the invading army. This is all witness knows.

J. D. HART.

Sworn to and subscribed before me, at Jacksonville, May 18, 1838.

JN. L. DOGETT, *Commissioner.*

EAST FLORIDA, *St. John's County.*

Upon the application of Susan Murphy, administratrix, you are hereby appointed to take the depositions of John Uptegrove, Francis Richard, sr., David Turner, Jesse Turner, Farquahar Bethune, and Seymour Pickett, in answer to the interrogatories annexed; and you are required to return the said interrogatories, with the depositions, when taken, and this order to the judge of the superior courts for the district of East Florida.

Dated this 28th day of July, 1835.

ROBERT RAYMOND REID,

*Judge Superior Courts District East Florida, and Com'r.*

GURNEY SMITH, Esq.

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*Claim in behalf of the estate of Andrew Atkinson, deceased, for losses sustained in East Florida in the years of 1812 and 1813.*

Interrogatories to be propounded to John Uptegrove, Francis Richard, sr., David Turner, Jesse Turner, Farquahar Bethune, and Seymour Pickett, all of Duval county, witnesses to be examined at the instance and in the behalf of the petitioner :

1. Your age?
2. Did you know Andrew Atkinson? Was he a Spanish subject in the beginning of the year 1812, and did he remain faithful and true to his allegiant duties during the disturbances of that and the subsequent year?
3. Did you know, at the time, of the destruction of the two plantations, Prechen and Ship Yard, the latter of which was owned and both occupied by the said Atkinson? If you do, state when they were destroyed, how, and by whom, and where said plantations were situated.
4. If said places were destroyed, state, if you please, if all the buildings on the Ship Yard plantation were destroyed, and of what said buildings consisted, and of what value they were.
5. Do you know if the said Andrew Atkinson lost any corn in store when said places were destroyed, and how much, and whether he lost cotton, also in store, at the same time; and if he did, how much cotton, and at what price was that article selling about the time referred to?
6. Do you know if the farming utensils on said places were destroyed, and of what value?
7. Do you know if said Atkinson lost horses, and how, and how many, and of what value?
8. Did he lose cattle, and how, and how many, and of what value?
9. Did he lose hogs, and how, and how many, and of what value?
10. Do you know of his having lost two canoe boats, and of what description and value were they, and how they were lost?

11. Do you know of a cotton gin lost by said Atkinson at some time above referred to? On which of said places was the gin, how was it lost, and what was its value?

12. What was the usual annual income of the planting interests of the said Atkinson at his said plantations; what would his crop of 1812 probably have yielded him; were said crops destroyed; how much ground did he cultivate, and how much of said ground was planted in cotton; how much in corn, potatoes, &c.; how was it destroyed, and when?

13. Was it possible for said Atkinson to have planted a crop with any prospect of reaping it during the year 1813? If not, how was he prevented, or whence proceeded the impediment; of what value ought the crop of that year to have been worth to him, had the situation of the country permitted him to plant?

14. How many negroes had said Atkinson; how many of them were workers; what became of them after the destruction of Prechen and Ship Yard plantations; was said Atkinson able to employ them in any profitable or safe manner at any time during the year 1812; wherefore could they not have been employed during said years; what would you judge to be a fair monthly charge for the support of a gang of negroes per head during said years for food and clothing; what was the hire of field hands per month in Florida at the time of the occurrence of disturbances?

15. Do you know where said Atkinson carried his family after the destruction of their home; was he obliged to hire a house for their shelter; do you know what said house cost him; what number did his family consist of?

16. Were the losses to which you have above testified occasioned by the United States troops, and would they have occurred but for the presence of the United States troops in the country?

17. Did they occur before or after the entrance of the agent and troops of the United States into East Florida, and in what year?

18. Has the said Atkinson, or his representatives, ever been indemnified for losses?

19. Are you in any manner interested in this claim; are you related to any of the heirs of Andrew Atkinson's estate? What is your occupation, and what were your opportunities of knowing the nature and extent of the losses of said Atkinson?

20. Was the said Atkinson in a prosperous and comfortable situation when the disturbances broke out; what became of his situation afterwards? What is the present situation of his family; if they are reduced and dependent, to what do you attribute the misfortune of that condition?

LEVY,  
*For Petitioner.*

*Cross-interrogatories.*

1. Have you an interest, direct or otherwise, in this claim?
2. Do you speak of the property mentioned in the direct interrogatories from hearsay or from your own knowledge and information?
3. Is your memory good, and are you certain that the petitioner

sustained losses ; if you say he did sustain losses, be pleased to say, if you know, of your own knowledge, what was lost? Make out, in your reply to this question, an accurate statement of the property lost by petitioner ; if you make out such statement, say, if you know, of your own knowledge, the value of the property lost ; if yes, state the value of each particular piece of property contained in your statement?

4. Be so good as to state the particular time when the losses occurred, and say by whom they were occasioned ; by patriots, United States troops, Spaniards, Indians, or by whom? Were you present when they occurred?

5. Tell all you know about this claim, whether for or against it?

ROBERT RAYMOND REID,

*Judge Superior Courts, District of East Florida,  
and Commissioner.*

John Uptegrove, a witness produced on the part of the claimant, being duly sworn according to law, deposes and says :

1. To the first interrogatory deponent answers that he will be seventy-two years old on the fifth day of August next.

2. To the second, deponent states that he knew Andrew Atkinson ; that he was a Spanish subject in the year 1812 ; that he continued faithful to his allegiance during the disturbances of 1812 and 1813.

3. Deponent states : Yes ; the said plantations were destroyed in the latter part of the year 1812. *They were burnt by the United States troops and their allies.* Prechen was situated on the *St. John's river*, about fifteen miles from the bar. The Ship Yard was situated near *St. John's bluff*, about ten miles from the bar.

4. All the buildings at the Ship Yard were destroyed, viz : *a dwelling house, cotton house, stable, gin house, and houses for slaves.* Can't say precisely as to the value, but think they were worth *one thousand dollars.*

5. Deponent answers : Yes ; deponent saw it in the gin house. There was a considerable quantity of cotton. Can't say how much ; it was selling at that time for 50 (say fifty) cents per pound.

6. Deponent answers : Yes ; they were probably worth *one hundred dollars.*

7. Deponent knows of but one horse lost. It was taken by the *United States troops from Prechen ; it was worth sixty or seventy dollars.*

8. Deponent states, *that he lost cattle and hogs*, but can't say how many, nor their value.

9. Deponent refers to the foregoing answer ; by that, he lost hogs, but don't know how many, nor their value.

10. Deponent cannot say.

11. Deponent answers : Yes ; it was at the Ship Yard. *It was burnt in the cotton house ; it was worth two hundred dollars.*

12. Deponent states, that his annual income from the plantation was about *two thousand dollars.* His crop of 1812 *would have yielded*



him two thousand dollars. It was burnt and destroyed. Can't say precisely how much ground he cultivated, but think it *was about fifty acres. About thirty acres were in cotton, and the remaining twenty in common potatoes.* It was destroyed in 1812 by fire.

13. Deponent answers: Yes; but he was prevented by the United States troops. His crop in that year, viz: 1813, ought to have brought him *two thousand dollars* if the situation of the country had been peaceable.

14. Deponent can't say. *The United States troops took five negroes when they set fire to the buildings.* He was not able to employ his hands in a safe way in 1812 and 1813; he could not employ them in consequence of the state of the country by reason of the invasion. Can't say what it would have cost to clothe and feed them per head; can't say what the hire of field hands was worth at the time, as there were no negroes hired.

15. Deponent answers, that Atkinson took his family, after the destruction of his property, to Amelia island, and afterwards to Darien; he rented a house in Fernandina, but can't say for how much. His family consisted of his wife, two sons, and two daughters.

16. Deponent answers: Yes; that said losses would not have occurred in the absence of the United States troops.

17. Deponent states that the losses occurred after the entrance of the agent and troops of the United States in 1812 and 1813; principally in the year 1812.

18. Deponent states, not to his knowledge.

19. Deponent answers: No; nor is he at all related to Atkinson or to his representatives. Deponent is a blacksmith by trade; he worked for them and lived with them.

20. Deponent states that he was in easy and comfortable circumstances before the disturbances broke out; he became very poor afterwards; his family are now very poor, dependent on their friends. Deponent attributes their present impoverished state to the losses which they sustained by means of the invasion of the United States troops.

#### *Answers to cross-interrogatories.*

1. Deponent answers: No.

2. Deponent states that he speaks from his own actual knowledge, having resided for several years in the family.

3. Deponent answers: Yes; that he is certain. Deponent further states, from his own knowledge, he lost all the buildings on Prechen and the Ship Yard, viz: a two story frame house at Prechen, with two brick chimneys, kitchen, store house, and corn house, also an orange grove; he lost at the Ship Yard a dwelling log house, cotton house, stable, houses for slaves, gin house, cotton gin, one horse at Prechen, a few cattle, hogs, farming utensils, his crops of cotton and corn, potatoes, &c., and sundry articles in the gin house, five negroes. Deponent estimates the losses sustained, at a reasonable value, to be seven thousand dollars.

4. Deponent states that said losses were sustained in the years

1812 and 1813 ; they were occasioned by the troops of the United States and their allies. Deponent was not present, but he saw the smoke arising from the houses.

5. Deponent says he knows nothing further for or against it.

JOHN UPTEGROVE.

Sworn and subscribed to before me, this 28th day of July, 1835.

GURNEY SMITH,  
*Commissioner.*



ESTATE OF ANDREW ATKINSON,  
*vs.*  
THE UNITED STATES.

} Claim for losses in 1812 and 1813.

TERRITORY OF FLORIDA, *Duval County.*

Francis Richard, a witness on the part of the claimant in the above case, being duly sworn, deposes and says, to wit :

To the direct interrogatories :

1. The first witness answers and says : He is fifty-nine years of age.
2. Witness answers and says : That he knew Andrew Atkinson ; Andrew Atkinson was a Spanish subject in the beginning of 1812, and remained faithful to his allegiance during said disturbances in that and subsequent years.
3. Witness answers and says : That Andrew Atkinson claimed, and was in possession of, a place called " Ship Yard," situated on the east side of the St. John's river, above St. John's bluff. Prechen was owned by Mrs. Jane Atkinson, and she lived on Prechen ; Prechen was destroyed in 1813 ; by hearsay witness knows that Ship Yard was also destroyed at the same time.
4. Witness answers and says : That he was not on Ship Yard from the beginning of 1812 to the summer of 1816 ; at this latter time the place was totally destroyed, and had the appearance of having been destroyed many years. He has no doubt, from the general report at the time, that the buildings on Ship Yard were destroyed in 1813 ; the buildings in Ship Yard were, one frame gin house, two stories high ; one cotton house, with two frame sheds ; one corn house, with two frame sheds ; a dwelling house, kitchen, store house, and negro houses. The whole were worth, in witness' opinion, from fifteen hundred to two thousand dollars.
5. Witness answers and says : He can state nothing in answer to this interrogatory of his own knowledge ; from what he heard at the time, he believes said Atkinson had cotton, corn, and peas, in store when the buildings were burned ; what quantity cannot say ; cotton was at that time, 1812 and 1813, selling at from fifty to sixty-two and a half cents per pound.
6. Witness answers, and says he does not know.

7. Witness answers and says : He knows nothing of the horses.
8. Witness answers and says : He knows nothing of the cattle.
9. Witness answers and says : Atkinson had hogs, but how many cannot say ; does not know that Atkinson lost them, but believes so from hearsay.
10. Witness says : He knows nothing of the boats.
11. Witness says : He often heard Atkinson speak of his cotton gin, of a new invention, but witness never saw the gin ; it was, he believes, at the Ship Yard.
12. Witness says : He does not know.
13. Witness says : That there was no security to the planting interest in East Florida, on account of the confused state of the country in 1813, caused by the United States troops.
14. Witness says : He does not know how many negroes Atkinson had, nor how many workers ; does not know what became of them, but was told that one William Cone, a citizen of Georgia, at the head of a party, took about five of his negroes and sold them in Georgia. Witness thinks that Atkinson could not have employed safely his negroes in any business on the St. John's river, at Ship Yard, or any place on said river. He could not because of the disturbed state of the country by United States troops and their allies. The expense to feed and clothe a gang of negroes at that time would be at least twenty-five dollars per head per year. By the year field hands were worth ten dollars per month ; axemen were worth from fifteen to twenty dollars per month.
15. Witness says : Atkinson carried his family to Cumberland island, in the State of Georgia ; Dr. Bayard's plantation was hired for them ; does not know the cost nor the number of which his family consisted. Witness paid four hundred dollars per year for a house and place on the main, fronting said island, for his own family.
16. Witness says : That he does not believe Atkinson would have sustained said losses had they not been occasioned by the troops of the United States and their presence in the country.
17. Witness says : He believes the losses of Atkinson occurred after the entrance of the agent of the United States and the troops into East Florida, and he believes the losses occurred in 1813.
18. Witness says : Not to his knowledge or belief.
19. Witness says : He is not interested in this claim ; he is not related to any of the heirs of said Atkinson estate ; opportunities as to Ship Yard unfavorable.
20. Witness says : The condition of Atkinson and family was then prosperous and comfortable ; his situation afterwards was distressing. The present situation of Mrs. Atkinson is by no means comfortable ; I attribute the dependant and reduced circumstances to the losses occasioned by the disturbances in East Florida in 1812 and 1813.

*Cross-interrogatories answered.*

1. To the first witness says : He has no interest in this claim.
2. Witness says : He speaks of the property from knowledge ; as to its destruction, he speaks from hearsay.

3. Witness answers: That his memory is good; he has no doubt that the said Atkinson sustained losses, but does not know, of his own knowledge, what he lost.

4. Witness says: He cannot state the time more particularly than he has done; was not present when the losses occurred.

5. Witness says: That he knows nothing more than what he has already stated.

F. RICHARD.

Subscribed and sworn to before me, this twenty-second day of May,  
A. D. 1837.

R. B. GREGORY, *Commissioner*.

ESTATE OF ANDREW ATKINSON	}	Claim for losses in 1812 and 1813.
vs.		
THE UNITED STATES.		

Farquhar Bethune, a witness produced by Susan Murphy, administratrix of Andrew Atkinson, deceased, being duly sworn according to law, deposes and says, to wit:

1. To the first interrogatory witness answers, that he is about fifty-four years of age.

2. Witness answers that he was well acquainted with Andrew Atkinson in 1812; said Atkinson remained faithful to his allegiance in 1812 and 1813, so far as it is known to witness.

3. Witness answers that, in 1812 and previously, said Atkinson resided at Prechen, on the river St. John's, opposite Dame's Point. Witness believes that Mrs. Atkinson, the wife of Andrew Atkinson, owned Prechen. Witness does not know anything of the Ship Yard. The buildings at Prechen were burned in 1813 by the United States troops or rebels when they were evacuating the province.

4. Witness answers that he knows nothing in relation to the Ship Yard.

5. Witness answers that he knows nothing.

6. Witness answers that he knows nothing.

7, 8, 9, 10, 11. Witness answers that he knows nothing in relation to the subjects inquired about.

12. Witness answers that said Atkinson, he knows, planted cotton and provisions previous to, and in, 1812; does not now recollect his force; crops at that time were usually valued at one hundred and fifty dollars for each taskable hand; no crops were gathered in 1812 by any planters on the St. John's river.

13. Witness answers that it was not possible for said Atkinson to have planted a crop in 1813 with any prospect of reaping it; he was prevented from planting by the country being in the possession of the United States troops.

14. Witness answers that field hands in 1812 were worth from ten to twelve dollars per month for plantation work; men to be en-

gaged in cutting timber were worth from sixteen to twenty-five dollars per month; the support of a gang of negroes in 1812 and 1813, per head, would, witness thinks, have cost from twenty-five to thirty dollars per annum.

15. Witness answers that he knows said Atkinson carried his family to Amelia island in 1812 and 1813; he hired a house at Fernandina to shelter them; witness does not know what his house cost said Atkinson; his family consisted of himself, wife, and three children; witness does not recollect the number of slaves.

16. Witness answers that no losses would have occurred in 1812 or 1813 but for the presence of the United States troops in East Florida.

17. Witness answers that all the losses in 1812 and 1813 occurred after the entrance of the agent and troops of the United States in March, 1812.

18. Witness answers that he has no reason to believe that said Atkinson or representatives have been indemnified for their losses.

19. Witness answers: That he has no interest in this claim; witness is not related to any of the heirs of Andrew Atkinson; witness is a planter; witness was well acquainted with said Andrew Atkinson, and knows that he suffered great losses, and he regrets that he cannot now speak as to the particulars.

20. Witness answers: That said Atkinson was comfortably situated at Prechen in 1812, previous to the rebellion, and he suffered much afterwards in consequence of the destruction of property in 1812 and 1813 by the rebels and United States troops.

*To the cross-interrogatories.*

1. To the first witness answers and says: That he has no interest whatever in this claim.

2. Witness answers: That so far as he has answered to the interrogatories he speaks from his own knowledge.

3. Witness answers: That his memory is good enough to remember that since Capt. Andrew Atkinson or his family sustained considerable losses in 1812 and 1813; witness can state nothing more than he has already said in the direct interrogatories; witness thinks the house burned at Prechen was fully worth \$2,500 without furniture.

4. Witness answers: That the house was burned about the 5th or 6th of May, 1813, either by the patriots or the United States troops when they were evacuating the country.

5. Witness answers: That he knows nothing more than he has already stated.

FARQUHAR BETHUNE.

Subscribed and sworn to this 5th day of January, 1837, before me,  
R. B. GREGORY,  
*Commissioner.*

TERRITORY OF FLORIDE, *Duval county, to wit.*

SUSAN MURPHA, Adm'x. of Andrew Atkinson,	}	Claim for losses in 1812 and 1813.
<i>vs.</i> THE UNITED STATES,		

Seymour Pickett, a witness produced in behalf of the claimant in the above case, being duly sworn according to law, deposes and says, to wit :

*To the direct interrogatories, to wit :*

1. Witness answers: That he is seventy-four years of age.
2. Witness answers: That he knew Andrew Atkinson in 1812; he was a Spanish subject, and was commandant military on the St. John's river, and had been some years previous to that time, and was some years subsequent thereto.
3. Witness answers: That the plantation called Prechen was on the St. John's river opposite to Dame's Point; the plantation "Ship Yard" was on the same side of the river below Prechen, adjoining St. John's bluff; they were destroyed; from the best information derived at the time, he believes they were plundered and burned by Alexander, who commanded a party of "patriots."
4. Witness answers: That he understood and believes all were destroyed; there was an excellent story and a half frame house, well finished and very comfortable; there were out houses usual on plantations, but noticed them particularly; cannot state their value, but is of opinion that the buildings he saw there could not have been put up for less than one thousand dollars; in fact thinks this valuation rather low.
5. Witness answers: That he knows nothing of said Atkinson's corn and cotton.
6. Witness answers: That he does *not know*; he knows that said Atkinson came, when he abandoned his plantations, to Amelia island, with his negroes, and had no farming utensils for them to work with. He understood at the time, and believes, that all his corn, cotton, and farming utensils were destroyed; can form no estimate of their value.
7. Witness answers: That he does not know of the loss of horses.
8. Witness answers: That he does not know of the loss of cattle.
9. Witness answers: That he does not know of the loss of hogs.
10. Witness answers: That he does not know that Atkinson had boats.
11. Witness answers: That he does not know what became of the gin; knows he had one on the plantation "Ship Yard." The common price of a cotton gin was one hundred dollars.
12. Witness answers: That he understood the crops of said plantations were destroyed, and destroyed in the fall of 1812. To the other particulars of this interrogatory witness is unable to give answers.
13. To the thirteenth witness answers: That he does not think it was possible for said Atkinson to have planted in 1813 with a prospect of reaping; prevented by the troubles occasioned by the entrance

of the United States troops into Florida ; can't say of what value the crops would have been.

14. Witness answers : That he does not know how many negroes Atkinson owned, nor how many of them were workers ; they were, after the destruction of said plantation, taken to Amelia island ; does not think he was able to employ them profitably ; knows that when he first came to Amelia his negroes were employed on the public works, for no compensation but their rations ; were thus employed two or three months. How they were employed after that time witness does not know ; they could not have been profitably employed on account of the disturbed state of the country, occasioned by the United States troops and their allies. There was no safety in the country. The fair monthly charge for the support of a gang of negroes would be two dollars per head. The hire of a negro, at that time, for plantation, was ten dollars per month. Witness was at that time superintendent of the public works then being constructed on Amelia island, and had six able-bodied hands, belonging to said Atkinson, at work for him for their rations. Atkinson had more negroes, but how many more cannot say.

15. Witness answers : That he carried them to Amelia island ; supposes he was obliged to hire a house for their shelter ; does not know what said house cost. Atkinson's family consisted of his wife, two daughters, and one son, then living with him.

16. Witness answers : That said losses were occasioned by the entrance of the United States troops into the Territory, and would not have occurred but for their presence in the country.

17. Witness answers : That said losses occurred after the entrance of said agent and troops into East Florida in 1812 and in the beginning of 1813.

18. Witness answers : Not to his knowledge ; does not think they have been indemnified.

19. Witness answers : That he is not interested in this claim ; is not related to any of the heirs of said Atkinson ; his occupation is that of a planter ; was a planter when the disturbances commenced in 1812 ; after he fled to Amelia island, was put in charge of constructing the public works there ; is a shipwright by trade.

20. Witness answers : That said Atkinson was in a prosperous and comfortable situation when the disturbances broke out in 1812 ; was a genteel man, and had a genteel family, and lived genteelly and easy, and independent circumstances ; afterward he lived in low circumstances, entirely dependent on his friends for support ; his family was broken up, and went to live with their relations ; some with one and some with another ; witness attributes the misfortune of their reduced circumstances and dependent condition to the loss of property and their being broken up, occasioned by the devastations committed in consequence of the entrance of the United States troops into East Florida.

To the cross-interrogatories, to wit :

1. To the first cross-interrogatory, witness answers : That he has not.

2. Witness answers: That he speaks from his own information and knowledge, except when it is expressly otherwise stated in his answers.

3. Witness answers: That he thinks his memory is good, and is confident that the petitioner sustained losses, and to a considerable amount; witness knows that the buildings were lost; they were burned; should think them worth at least one thousand dollars, or more; knows that the six negroes were Atkinson's, and that they labored on the public works for their rations.

4. Witness answers: That the losses occurred in the latter part of 1812 or early part of 1813; they were occasioned, as witness was told by some of the party under Alexander, by the patriots under Alexander; witness was not present when they occurred.

5. Witness answers: That he has told all he recollects.

SEYMOUR PICKETT.

Sworn and subscribed before me, this 31st day of May, A. D. 1836.

R. B. GREGORY,

*Commissioner.*

EAST FLORIDA, *St. John's County.*

Upon the application of Susan Murphy, administratrix, you are hereby appointed to take depositions of Isaiah D. Hart, in answer to the interrogatories annexed; and you are hereby required to return the said interrogatories, with the depositions, when taken, and this order to the judge of the superior courts for the district of East Florida.

Dated this 16th day of May, 1838.

ROBERT RAYMOND REID,

*Judge Superior Courts District East Florida.*

JOHN L. DOBGETT, Esq.

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*In the matter of the claim of estate of Andrew Atkinson, for losses in 1812 and 1813.*

Interrogatories for Isaiah D. Hart.

1. Did you know Andrew Atkinson; had he a plantation on the St. John's river when the United States troops entered East Florida in 1812?

2. Was his property destroyed by the invading forces?

3. Did he lose 200 bushels of corn; did he lose cotton in the house, and how much; if you do not know what particular quantity he had, say if you were familiar with his affairs, and frequently on his place, and if, from your knowledge of his planting interests, he probably had on hand a quantity of these articles, and how much could you suppose; is the quantity of corn charged what he would have been



likely to have on hand for his plantation use at the time ; do you know if he had shipped all his cotton of the preceding year's growth?

4. Was his place well stocked with farming utensils ; did he lose any of them ?

5. Did he lose horses ; how many ; what were they worth ?

6. Had he cattle ; did he lose any, and how many ; hogs, and how many did he lose ; how many had he do you think ; could he have taken any of them away, or recovered them ; what were they worth ?

7. Had he two canoe boats ; what were they worth ; did he lose them ?

8. Had he a plantation called Ship Yard ; were there buildings upon it ; enumerate them, and say what they were worth, in your opinion ; were they lost ?

9. Did Atkinson lose his crops of 1812 and 1813 ; what do you think the crop of each year would have been worth ; if he did not plant in 1813, what prevented ; how many acres of land did he usually plant, and what part in cotton ?

10. Where did he carry his negroes when driven from his place ; could he obtain employment for them during the continuance of the invasion ; and what do you think was the cost of supporting them ?

11. Do you know if he had to hire a house for the residence of his family, and what it cost ?

12. Do you think annexed account a fair estimate of his losses ?

D. LEVY, *Atty. for Petitioner.*

*Statement of losses.*

200 bushels of corn .....	\$200 00
5,000 lbs. cotton in the seed, at 8 cents.....	400 00
Various farming utensils .....	50 00
3 horses, of the value of.....	300 00
4 head of cattle.....	60 00
66 head of hogs.....	198 00
2 canoe boats .....	150 00
Property destroyed at Ship Yard—crops of the years 1812 and 1813.....	3,000 00
Cost of supporting the negroes of the estate during the years 1812 and 1813.....	600 00
House-rent for the family of said Atkinson during those years.....	150 00

*Cross-interrogatories.*

1. How do you know that Atkinson sustained losses ; who told you so ; how do you know that Atkinson owned property ; how do you know what the value of that property was ?

2. Was Atkinson one of the patriots ; what concern had he in the revolution ; were you related to him ; are you related to the present claimant ?

3. What is your age ; where were you in 1812 and 1813 ; were you one of the patriots ; have you claims for losses ?

4. If you say that losses were sustained by Atkinson, say *when, where, how, and by whom* they were occasioned ; and tell all you know, whether for or against this claim ?

ROBT. RAYMOND REID,  
*Judge and Commissioner.*

ESTATE OF ANDREW ATKINSON,	}	Claim for losses in 1812 and 1813.
<i>vs.</i>		
THE UNITED STATES.		

Answers of I. D. Hart, in the above case. to the direct interrogatories :

1. Answer to the first interrogatory. Witness says he knew Andrew Atkinson, and that he had two plantations on the St. John's river in 1812, one called the Ship Yard, the other Prechen.

2. Witness answers, that claimant's property was destroyed in consequence of the operation of the invading forces.

3. Witness says, in 1813 he was on his plantation at the Ship Yard, and he planted there. This is all witness can answer, and all he knows of the matters inquired of in the third direct interrogatory.

4. Witness says claimant had the farming utensils, but he don't know what became of them.

5. Witness says deceased had three horses, and they were taken off by the invading army. Witness saw a man belonging to the party riding one; they were very pretty horses, but the precise value witness is unwilling to estimate.

6. Witness says deceased had cattle, but how many don't know; thinks he could not have carried them off with him; and witness states, he has every reason to believe that he lost both cattle and hogs, but what number of either he don't know.

7. Witness answers that deceased had both, but he don't know what became of them.

8. Witness says deceased had a plantation at the Ship Yard; it had a great many buildings upon it—dwelling house, cotton house, corn house, gin house, kitchen, with other necessary out buildings, together with a great number of negro houses; can't tell the value of the enumerated buildings, but says that they were worth a good deal. The property above spoken of was burnt up; and the loss was caused by means of the invading army.

9. Witness thinks deceased lost his crops in the years 1812 and 1813; but how much he planted, and how much his crops were worth annually, witness can't state.

10. Witness says deceased was driven from his place by the revolutionary movements of the invading army, and that he carried his negroes to Amelia island; don't believe the negroes could have been hired at this time; all business was stagnant in consequence of the revolutionary war then raging; and witness is well convinced that deceased did incur considerable expense for maintenance of them, but how much can't say.

11. Witness says he owned no house at Amelia; of course he had

to hire, for Atkinson was not a man who would live out doors ; but of his charge knows nothing.

12. Witness says he lost property at the Ship Yard, and at his place called Prechen ; but how much, and the value thereof, can't say.

*Cross-interrogatories :*

1. In the first cross-interrogatory, witness answers: that he was frequently at Prechen and at the Ship Yard, and saw the improvements ; and was there afterwards, and saw the buildings were destroyed ; and that it was a matter of public notoriety that they were burnt ; has not stated the value of property anywhere, because he did not know its value.

2. Witness says Atkinson was not a patriot ; he had nothing to do with the revolution but to get out of danger of it ; is not related to the deceased, nor to the present claimant.

3. Witness says he is forty-five years old ; was on St. Mary's and St. John's in Fernandina, and before St. Augustine, in 1812 and 1813 ; and was a patriot, and is now. Witness says he has a claim for losses through his father's estate.

4. Witness says : He has stated, as full as he can, respecting all the losses he has testified concerning, except the houses at Prechen ; on this place there was a large two story house with two chimneys to it, and several other out buildings—say a kitchen, a store house and negro houses—all of which were burned up ; did not see them burn, but saw them after they were burned, and saw them before they were burnt ; and it was a matter of public notoriety *when* they were burnt, and by the invading army. This is all witness knows.

I. D. HART.

Sworn and subscribed to before me, at Jacksonville, May 18, 1838.

EAST FLORIDA, *St. John's County.*

Upon the application of the administratrix of Atkinson you are hereby appointed to take the depositions of Isaiah D. Hart, a witness for the claimant, in answer to the interrogatories annexed, and you are required to return the said interrogatories with depositions, when taken, and this order to the judge of the superior courts for the district of East Florida.

Dated this 18th day of June, 1838.

ROBT. RAYMOND REID,  
*Judge and Commissioner.*

The Hon. JOHN L. DOGGETT, Esq.

*Additional interrogatories to be administered to Isaiah D. Hart, a witness in the matter of the claim of Susan Murphy, administratrix of Andrew Atkinson.*

1. In your answer to the 3d direct interrogatory, heretofore propounded to you, you are made to state that Andrew Atkinson planted at the Ship Yard in 1813; did you so mean, or that he planted there in 1812?

2. Were the buildings at the Ship Yard burned in 1812 and 1813; and if in 1813, at what time of the year; before or after the troops left the province?

3. Do you think the buildings at the Ship Yard were worth two thousand dollars; were they worth three thousand?

4. Could he have planted a crop at the Ship Yard in 1813?

LEVY, *for Claimant.*

*Cross-interrogatory:*

1. Are you *quite sure* that, in the answer alluded to in this case, you did not mean 1813 instead of 1812; tell all you know about this claim, whether for against it.

ROBT. RAYMOND REID.

*Judge and Commissioner.*

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ADMINISTRATRIX OF ANDREW ATKINSON	}	Claim for losses in 1812 and 1813.
vs. THE UNITED STATES.		

Answers of I. D. Hart to the direct interrogatories of a witness in the above case:

1. Witness says: In his deposition before given in this case he did mean to say that Andrew Atkinson planted at the Ship Yard in the year of our Lord one thousand eight hundred and thirteen.

2. Witness says: The buildings were burnt in the year one thousand eight hundred and thirteen, but at what time in the year he don't remember.

3. Witness says: That the buildings at the Ship Yard were worth three thousand dollars.

4. Witness says: That he could plant a crop at the Ship Yard in one thousand eight hundred and thirteen.

*Answer to the cross-interrogatories:*

1. Answer to the first cross-interrogatory. Witness says: He meant to testify in point of time to the year eighteen hundred and thirteen.

The witness further states that Atkinson planted in the year one thousand eight hundred and thirteen, but that he could not gather his crop that year in consequence of the disturbed situation of the

country, caused and acted by the movements of the United States troops then in Florida ; and this is all witness recollects about the claim.

I. D. HART.

Before me, at Jacksonville, June 29, 1838.

J. L. DOGGETT, *Commissioner*.

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*In the matter of the claim of Susan Murphy, administratrix of Andrew Atkinson, deceased.*

Interrogatories to be propounded to Joseph S. Sanchez :

1. Did you witness the burning of Andrew Atkinson's property at the Ship Yard, on St. John's river? By whom was it burnt, and when? Was it before the withdrawal of the United States troops from East Florida? State all you know.

D. LEVY, *for Claimant*.

2. Be pleased to be as accurate as possible as to time, and state particularly by whom (according to your own knowledge) this property was destroyed? Describe the property destroyed, and amount of the loss? Tell all you know upon the subject of this claim, whether for or against it.

ROBERT RAYMOND REID,  
*Judge and Commissioner.*

*Direct interrogatory :*

Joseph S. Sanchez being duly sworn, says, to first interrogatory :

He witnessed the burning of Andrew Atkinson's property at the Ship Yard, on the St. John's river ; the property was burnt by the troops on their retreat from the Territory ; a part of the army, on descending the St. John's, stopped at the Ship Yard ; and, on their leaving the landing, witness saw the buildings on fire, and supposes they were fired by the party who landed there.

*Cross-interrogatory :*

Joseph S. Sanchez being duly sworn, says, to first interrogatory :

The property was destroyed some time in the year 1813, when the American troops were evacuating the country. It was a plantation with several large buildings on it, such as dwelling-house, corn-house, kitchen, and other buildings, generally attached to such establishments ; cannot say what the extent of the losses were. Witness was young when they occurred, and cannot state the value of the property.

JOS. S. SANCHEZ.

Sworn and subscribed before me,

P. B. DUMAS, *Commissioner*.

St. AUGUSTINE, *November* 19, 1838.

*The claim of the Administratrix of Atkinson.*

John M. Bowden, a witness: Knew William Cone in the years 1812 and 1813; he was a citizen of Georgia; he came to the country in 1812, witness thinks in the month of March; he commanded a company of militia, and was under the control and command of Governor Mathews and Colonel Smith. Cone left the country just after or about the time the United States troops left the country. Witness don't remember or think that Cone was engaged in the skirmish with the British which occurred after the United States troops left the country. Cone was on the river St. John's about the time the houses and improvements at Prechen and the Ship Yard were destroyed; of the destruction of this property witness heard two or three days after it occurred, and the United States troops had not left the country then. Cone was on the river at that time; he left Camp *New Hope*, on the St. John's, about that time. Witness knows that Cone went down the river about the time of the evacuation, and witness thinks before he heard of the burning of the property at Ship Yard and Prechen. Cone was of the party that went down the river when the conflagration at the place before mentioned occurred. Witness was not in the country at the time of the skirmish on the St. Mary's. When the troops evacuated the country they burnt the buildings of the plantations on the St. John's river, where they stopped on their way down the river.

*The award.*

There is not sufficient proof of the loss of corn and cotton on hand, and those items of the claim are therefore disallowed.

The following losses are allowed :

The farming utensils. ....	\$50
Three horses.....	150
Destruction of buildings at the <i>Ship Yard</i> .....	1,000
One cotton gin.....	100
Crops of 1812.....	1,500
Crops of 1813.....	1,000
	<hr/>
	3,800
	<hr/>

The proofs relating to cattle, and hogs, and boats, are not satisfactory.

The loss of the improvements and orange grove at Prechen has been already allowed to Mrs. Jane Atkinson in another claim.

The petition does not contain an item for the loss of negroes.

The evidence of Mr. Bethune and Colonel Sanchez is that upon which I have principally relied in relation to the destruction of property at the Ship Yard by the United States troops and patriots.

It is, therefore, considered that the claimant do recover the sum of three thousand eight hundred dollars for her intestate losses in 1812 and 1813, with an interest of 5 per centum from the 10<sup>th</sup> of May, 1813.

ROBT. RAYMOND REID,

*Judge and Commissioner.*

TERRITORY OF FLORIDA,  
*District of East Florida:*

I hereby certify that the foregoing pages, from one (1) to seventy-four (74) inclusive, contain a true copy of the claim of Mrs. Susan Murphy, the administratrix of Andrew Atkinson, deceased, the evidence taken therein, and the award thereon, the originals of which are now on file in my office.

Dated at St. Augustine, August 15, 1839.

ROBT. RAYMOND REID,  
*Judge and Commissioner.*

TREASURY DEPARTMENT, SOLICITOR'S OFFICE,  
*March 9, 1852.*

SIR: I have examined the case of the administratrix of Andrew Atkinson and the testimony taken in the same, referred to this office, and respectfully report that the case was before Mr. Secretary Woodbury in 1839. The only item of the claim in controversy is for "loss of crops in 1812." The case was referred to Mr. McClintock Young, chief clerk, who reported in the first instance that "he thought this a fair case, and should be confirmed." Subsequently he suggested a doubt, inasmuch as Atkinson abandoned his property at the time of the invasion, the item should be allowed. Mr. Young expressed no doubt in regard to the destruction of the crop of 1812. Mr. Rodman, a clerk in the department, had examined the case and reported to Mr. Young.

Mr. R. says: "In regard to the abandonment of the plantation to which Mr. Young refers, it appears from the general scope of the testimony to have taken place after the destruction of the property at Ship Yard, as proved by the testimony of Uptegrove, who states that he resided in the family." Mr. Rodman, I have no doubt from the examination of the testimony of Uptegrove, came to a correct conclusion. It is understood, I believe, that the objection on the ground of abandonment was abandoned by the Secretary. The Secretary speaks of his embarrassment in the case growing out of the commingling in the petition of Mrs. Murphy, the administratrix of Atkinson, filed March 29, 1838, of the years 1812 and 1813, and also of the confusion of the years in the testimony. He refers to the petition of Mrs. M., and says that "the petition dates the whole indiscriminately as in 1812 and 1813. Yet the original proprietor in 1817 expressly states that certain injuries were committed on one of his plantations in 1812, *without including the crops.*"

True, the petition so sets forth the years. It can excite no surprise that the administratrix, in setting forth losses which happened in 1812, (twenty-six years before making the petition,) could not be precise as to dates. But the Secretary was in an error in supposing that the original sufferer failed to give the true dates so far as the years were concerned. The statement of Mr. Atkinson, to which the

Secretary refers, made under oath and certified to by respectable witnesses, expressly charges for the loss of "the crop of 1812." He says: "*In the year 1812 the rebels possessed themselves of my plantation on the river St. John's.*" This sworn statement was made 1st January, 1817, only five years after the destruction of the property, and before he had any expectation of obtaining relief from this government for his losses. Mr. Young, remarking on this statement of Atkinson, very justly says: "I think some reliance should be placed on the statement of Atkinson made before the Spanish authorities on 1st January, 1817, in which he states that the rebels possessed themselves of his plantation in 1812. To that statement is attached a certificate of two persons, who say 'the statement is true, and of which they had a good deal of knowledge.'" It may be said that this is the statement of the original owner; *true*, but is it not to have weight in connexion with the other testimony, especially with regard to the date, the year? In this point of view it should have consideration when weighed against conflicting testimony, and that testimony, *pro* and *con*, about equally balanced. Mr. Atkinson may be suspected, as all other men would be, swearing in their own case, of a bias in favor of his own interest. But he could have had no possible motive to have sworn falsely to the happening of the loss in 1812. For so far as compensation was concerned, as the matter then stood it was no sort of consequence whether it happened in 1812 or 1813. His statement was made within a few years of the happening of the events of 1812 and 1813 in Florida. All of them must have been fresh in his memory. Besides, if he swore falsely as to the year, the whole community were there to upbraid him with the perjury. He would hardly have called two witnesses to attest by their signatures the execution of a statement which, if false, must have been known to them.

The Secretary, in reviewing these Florida cases, does not sit as a judge at common law, applying to each case its rigid rules. He reviews them more as a chancellor. He is to decide, in the language of the statute, what is "*equitable and just within the provisions of the act.*"

In equity proceedings, if the sworn bill of the complainant is not denied by the respondent it is admitted. Has the testimony invalidated this statement? In my judgment the balance of it is in favor of the statement; but admitting the testimony to be in equilibrio, then certainly the sworn statement, so far as the date or year is concerned, (and that is the only question in the case,) should control the matter. Atkinson, in his statement, claims "*for three horses lost in 1812.*" The claim for the horses was allowed by Mr. Woodbury. Why? According to his view of the case, the United States troops were not on Atkinson's plantation in 1812, and for this reason the claim for the 1812 crop was rejected. But it is shown by the testimony of a witness, Hart, (page 34 case,) that "deceased (Atkinson) had three horses, and they were taken by the marauding army. The witness saw a man belonging to the party riding one. The horses could not have been taken from the plantation unless the army or some of its men had been upon it. The proof which warrants the



allowance for the horses would justify the allowance for the crop of 1812.

The testimony proving the happening of the loss of the crop of 1812 is, 1st, that of Utpegrove; he swears (page 14) that "the plantations were destroyed in the latter part of the year 1812. They were burned by the United States troops and their allies." Again, (page 15,) the crop of 1812 would have yielded him \$2,000." Again, (page 16,) the losses occurred principally in 1812." The witness is particular in describing the quantity of land covered by the crop of 1812: "about thirty acres in cotton and twenty in corn and potatoes." The witness says (page 17) that "he speaks from his own *personal knowledge*, having resided for *several years in the family*." Bethune, another witness, says (page 22) "no crops were gathered in 1812 by any planter on the St. John's river."

Pickett, witness, (page 26,) speaks of the destruction of the crop in 1812. As opposed to this testimony, the Secretary refers to that of Hart, Richard, Bethune, and Sanchez. I will examine the testimony of these witnesses and see whether they outweigh that of the other witnesses, sustained by the oath of Atkinson. Hart, in his first testimony, (page 58,) says that "he thinks that deceased lost his crops in the years 1812 and 1813." In his subsequent testimony (page 69) he says that "the buildings were burned in 1813, but in what time of the year he does not know."

The Secretary quotes the testimony of Richard, (page 18.) It will be seen, by referring to it, that the witness only speaks "*from general report*." So, at page 47, he says, "by hearsay he knows that the Ship Yard plantation was destroyed in 1813." I have already referred to Bethune's testimony, that no crops were gathered in 1812 by *any planter* on the St. John's. The Secretary refers to his testimony, (page 22.) He there testifies to the destruction of the *buildings at* Prechen in 1813. So, at page 24, he only speaks of the burning of *the house*.

Sanchez, (page 72,) in speaking of the year with candor, admits that he was young when the losses occurred, and it will be remembered that he was speaking of an event then gone by some twenty-six years.

That Atkinson planted crops in 1812 cannot be controverted.

Bethune says, (page 22,) "that said Atkinson, he knows, planted cotton and provisions previous to and in the year 1812;" and this is the testimony of the other witnesses to the same effect, which need not be referred to.

It is equally clear that he actually lost one year's crops at least; no one denies that. If so, it must have been the crop of 1812, for it is abundantly proved that he could not plant in 1813, in consequence of the occupation of the country by the American troops.

Utegrove says, (page 15,) "He (Atkinson) was prevented planting in 1813 by the United States troops."

Pickett says (page 26) that "it was not possible to plant in 1813."

Bethune says, (page 23,) "He (Atkinson) was prevented from planting by the country being in the possession of the United States,

ops." This was in answer to interrogatory 13, in regard to planting in 1813.

In this, as in many of the cases, the Secretary allowed for the loss the crop that might have been planted in 1813, (estimating it at two-thirds of the value of the crop of the preceding year,) for the reason that it could not be planted in consequence of the presence of the ops.

In looking minutely to the whole case and testimony, I have no doubt of the propriety of allowing for the loss of the crop of 1812, amounting to \$1,500.

Your obedient servant,

J. C. CLARK, *Solicitor*

Hon. THOMAS CORWIN,  
*Secretary of the Treasury.*

TREASURY DEPARTMENT,  
*September 21, 1852.*

In the within case of the estate of Andrew Atkinson, deceased, a claimant under the 9th article of the treaty with Spain of the 22d January, 1819, for losses in East Florida in the years 1812-'13, it appearing that an award, amounting to the sum of \$3,800, was made Judge Reid, at St. Augustine, on the 15th August, 1839, on which a sum of \$2,300 was approved and paid, under the decree of this department, dated November 28, 1839, as per statement filed in the office of the Register, (No. 78,295;) and it further appearing to the satisfaction of the department, on a careful examination of the case, that the further sum of \$1,500, included in said award, is justly due said claimant, the said sum of \$1,500 is allowed, without interest, the balance in full of the entire claim, to be paid to the legal representative of said Andrew Atkinson.

Done in virtue of the power vested in me by the act passed the 26th June, 1834, "for the relief of certain inhabitants of East Florida."

Referred to the First Auditor for settlement.

THO. CORWIN,  
*Secretary of the Treasury.*

## UNITED STATES COURT OF CLAIMS.

## BRIEF.

LETITIA HUMPHREYS, ADMINISTRATRIX OF THE ESTATE OF ANDREW ATKINSON, DECEASED. A CLAIMANT UNDER THE NINTH ARTICLE OF THE TREATY OF 1819 BETWEEN THE UNITED STATES AND SPAIN,

vs.

THE UNITED STATES.

This is one of a class of cases arising under the 9th article of the treaty of February 22, 1819, between the United States and Spain, and the acts of Congress passed to carry it into effect.

The petition in this case is founded on a decision and judgment in favor of the estate of the said Andrew Atkinson, deceased, made by the Judge of the superior court established at St. Augustine, in the late Territory of Florida, under the treaty and acts aforesaid; and is filed to recover the unpaid portion of said judgment.

The proceedings and judgment in favor of the said Atkinson's estate are shown by the record sent from the Treasury Department and on file in this case.

The grounds on which the unpaid portion of said judgment was rejected, and the payment thereof refused by the Secretary of the Treasury, are briefly set forth in the petition filed in this case, and will more fully appear from the following statement:

HISTORICAL STATEMENT OF THE ORIGIN AND NATURE OF THE CLAIMS OF 1812 AND 1813.

The treaty of 1795, between the United States and Spain, established relations of peace and amity between the two governments, which continued, without interruption on the part of Spain, until the final ratification of the treaty of 1819. From the year 1807 to the year 1812, and until the period of the declaration of war by the United States against Great Britain, in that year, the neutral rights and commerce of the United States were so far disregarded by England and France, and other European powers acting in concert with them, that Congress was compelled, in defence of those rights, to enact a series of acts known as the Embargo and Non-intercourse Laws.—(*Treaty of 1795, with Spain, 8 Stats. at Large, p. 138; Embargo Laws, 2 Stats. at Large, pp. 451, 452, 453, 454, 473, 474, 475, 490; 499 to 502; 506 to 511; 531; 528, sect. 19; 533; 547; 700, 701; 707, 708, 719; 763; 3 Stats. at Large, p. 88; Non-intercourse and Non-importation Acts, 2 Stats. at Large, 379, 401, 469, 532; 528 to 533; 530, sec. 11; 550, 551; 605, 606; 651; 755; 763. Berlin and Milan Decrees, and British Orders in Council, Ramsay's U. S. History, vol. 3, p. 462 to 476, Appendix.*)

In the year 1811, the relations between the United States and Great Britain, and between the latter power and Spain, were of such a character as to create an apprehension on the part of the United States that Great Britain would seize the provinces of East and West Florida, then a dependency of the crown of Spain; and the United States

long looked to a cession of these provinces as an indemnification for her just claims upon Spain ; and being unwilling, from their political position, that any other power, and especially Great Britain, should possess them, Congress, on the 15th day of January, 1823, passed a secret act and joint resolution, authorizing the President to take possession of the said provinces, and for that purpose to employ the army and navy of the United States, and appropriating \$100,000 for that object.—(3 *Stats. at Large*, pp. 471, 472.)

Under this action of Congress, and under the orders of the President in pursuance thereof, East Florida was invaded early in March, 1823, by the army and navy, and by certain irregular forces of the United States—the latter being mostly from the contiguous State of Georgia—and the whole inhabited portion of the country, except the town of St. Augustine, including Amelia island and the neutral port of Fernandina, was taken forcible possession of, and retained till about the middle of May, 1823.—(*Judge Bronson's Op. in case of Ferreira*, 12.)

During the period of this invasion, owing to the operation of the Embargo and Non-intercourse Laws of the United States, a vast neutral trade was carried on at the port of Fernandina, on Amelia island, which was the only port on the American coast which was open to the products of the West Indies, and at which an exchange of commercial articles could be made fully and safely. The Baltic sea being closed, by the political relations then existing between the powers of Europe, vast quantities of lumber and ship timber, among other things, were exported from that place. The slave trade, which was closed in the United States in 1808, was still open in Florida, as a province of Spain. The state of things in Florida, the great facility afforded by the laws of Spain for the naturalization of foreigners in that province, and the liberal grants of land made both to Spaniards and immigrants, with the attractions of a mild and salubrious climate, singularly adapted to the culture of sea island cotton and other valuable productions, led to a concentration of much of the wealth of the Carolinas and Georgia in East Florida, at and previous to this period.—(*State Papers*, by Gales & Seaton, *Pub. Lands*, pp. 725 to 895.)

The occupation of East Florida by the American forces was stoutly and forcibly resisted by the Spanish authorities thereof, giving rise to great bitterness and hostility on the part of the former government ; and an occupation which was designed by Congress to be peaceful on the part of the United States, and voluntary on the part of the authorities and subjects of the province, was converted into a forcible and violent conquest, by the American forces, of this helpless province of a power with which we were bound to the observance of peace, by the most solemn treaty stipulations.

A judicial history of the wanton and indiscriminate destruction of every species of property, during the invasion and occupation of the province, as aforesaid, the following extracts are made from the returns and reports to the Treasury Department by Judges Smith, and Bronson, who were charged with the adjudication of these claims :

Judge Smith says: "It has been fully proved by the testimony which in various cases has been adduced before me, that in the years 1812 and 1813 the province of East Florida was invaded by citizens of the United States, denominated patriots, principally from Georgia, and also by the regular troops belonging to the army of the United States; that these in effect co-operated; and that the whole population of East Florida, north and west of Augustine, and on the banks of the St. John's, were compelled to take part therein, or to abandon their plantations.

"It has been further proved that the cattle, horses, swine, and moveables of the plantations of this portion of the province, were, during this incursion, almost without exception, destroyed, dispersed, and lost to the owners; that the buildings, fences, and crops of many plantations were wholly destroyed, sometimes having been previously abandoned by their owners, and at others the owners having remained till the destruction commenced."

Judge Reid, after describing the previous flourishing condition of the province, says: "This revolution, which ceased in 1813, left the country desolate. Plantations, farms, houses, stock, poultry, tools, and implements—every thing in the shape of property—had been pillaged or destroyed. The country was a desert; many persons in comfortable circumstances in the beginning of 1812 were reduced to extreme poverty in the course of fourteen months, and East Florida has never recovered from the shock it then received."—(See Solicitor Clark's Rep. to the Secretary of the Treasury, dated March 7, 1851. Ap. pp. 14, 15.)

Judge Bronson, in his decision in the case of Ferreira, administrator of Pass, says: "The difficulty of obtaining supplies for such a force led them at once to look to the resources of the country; and large droves of cattle, with which the country then abounded, were immediately and unhesitatingly seized upon to relieve their necessities; and foraging parties, consisting both of regular troops and patriots, were sent out in all directions to collect cattle and other means of subsistence for the army. \* \* \*

"A detail of some of the more revolting instances of robbery and plunder and wanton destruction on the one hand, that occurred during this period, or of individual cases of hardship, ruin, and beggary on the other, is hardly called for, and perhaps not proper in this general statement, though they might tend much to illustrate the general character of the injuries of that period. Suffice it to say, that before or when the United States troops finally evacuated the country, the whole inhabited part of the province was in a state of utter desolation and ruin. Almost every building outside of the walls of St. Augustine was burned or destroyed; farms and plantations laid waste; cattle, horses, and hogs driven off or killed, and moveable property plundered or destroyed; and in many instances slaves dispersed or abducted. So far as the destruction of property of every kind was concerned, the desolation of the Carnatic by Hyder Ali was not more terrible and complete."—(Decision, pp. 9, 10.)

Colonel Smith, of the United States army, who commanded the invading force, wrote to his government: "The inhabitants have all

abandoned their houses, and as much of their moveables as they could not carry away with them." He adds: "*The province will soon become a desert.*"—(Solicitor Clark's Rep. above cited, App. p. 15.)

President Monroe, then Secretary of State, in a letter to Governor Mitchell of 10th April, 1812, after alluding to the fact that the troops of the United States had been used to dispossess the Spanish authorities by force, says: "I forbear to dwell on the details of this transaction, because it is too painful to recite them."—(Am. State Papers, For. Aff., vol. 3. p. 571.)

For a more full history of these transactions, see the correspondence between Mr. Monroe and Mr. Foster, at pages 543. 544, and 545, of the third volume of American State Papers, Foreign Relations; also the documents communicated by the President to the House of Representatives on the 1st July, 1812, at page 571, &c., of the same volume of American State Papers, consisting of instructions to General Matthews and Colonel McKee: Mr. Monroe's letter of recall to General Matthews, and also his letter of instructions to Governor Mitchell.

These injuries, which were protested against by Spain, were in open violation of the law of nations and of the treaty of peace then existing between the two governments, and were so admitted to be by the United States; and their commissioner, General Matthews, was punished by dismissal.—(Am. State Papers, above cited.)

During the war between the United States and Great Britain, in 1814, West Florida was entered by General Jackson, and the army under his command, to expel the British and their Indian allies from Pensacola; and in 1818, the same officer again entered West Florida, in pursuit of the Indians, and St. Mark's and Pensacola were taken, and subsequently restored.—(For invasion of 1814, see American State Papers, Military Affairs, vol. 1, p. 698 to 707. For invasion of West Florida, in 1818, see American State Papers, Military Affairs, same volume, from p. 697 to 702.)

Both these last named acts of General Jackson and his army were also complained of by Spain as violations of her neutrality; but were justified or sought to be excused, by the United States, on the ground of necessity; while no such ground was ever urged in justification of the invasion of East Florida, in 1812 and 1813.

#### TREATY. AND ACTS TO CARRY IT INTO EFFECT.

For all these alleged injuries, Spain earnestly demanded satisfaction; and when the treaty of 1819 was concluded, the following provision was inserted, and constitutes the last clause of the 9th article of that instrument, viz:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers and individual Spanish inhabitants, by the late operations of the American army in Florida."

The Spanish version of this article does not contain the word "*late*," but reads simply, "*by the operations of the American army in the Floridas.*"—(8 *Stats. at Large*, p. 260.)

The last protocol of this clause, from which both sides of the treaty

were drawn, and which was written in the *English language*, was in the following words, corresponding with the Spanish version :

"The United States will satisfy all the just claims which the inhabitants and Spanish officers of the Floridas may have upon them, in consequence of the damages they may have sustained by the operations and proceedings of the American army, as is customary with the citizens of the United States." Opposite to which, in a parallel column, Mr. Adams wrote the word "agreed."—(*Am. State Papers, Foreign Relations, vol. 4, p. 622.*)

"To carry into effect" this provision of the treaty, Congress passed the act of March 3, 1823, which is as follows :

"AN ACT to carry into effect the ninth article of the treaty concluded between the United States and Spain the twenty-second day of February, one thousand eight hundred and nineteen.

"SEC. 1. That the judges of the superior courts established at St Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed to receive and adjust all claims arising within their respective jurisdictions of the inhabitants of said Territory, or their representatives, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said Territory was ceded to the United States.

"SEC. 2. That in all cases in which said judge shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged, out of any money in the treasury not otherwise appropriated. Approved, March 3, 1823."—(*3 Statutes at Large, p. 768.*)

Secretary Rush having decided that the losses of 1812 and 1813, in East Florida, were not embraced by the above clause of the treaty, Congress, after full deliberation, passed the explanatory act of June 26, 1834, recognizing the losses of those years to be within the treaty. That act is as follows :

"AN ACT for the relief of certain inhabitants of East Florida.

"*Be it enacted, &c.*, That the Secretary of the Treasury be, and he hereby is, authorized and directed to pay, out of any money in the treasury not otherwise appropriated, the amount awarded by the judge of the superior court at St. Augustine, in the Territory of Florida, under the authority of the 161st chapter of the acts of the 17th Congress, approved March 3, 1823, for losses occasioned in East Florida by the troops in the service of the United States, in the years 1812 and 1813, in all cases where the decision of the said judge shall be deemed by the Secretary of the Treasury to be just: *Provided*, That no award be paid except in the case of those who, at the time of suffering the loss, were actual subjects of the Spanish government: *And*

*provided, also, That no award be paid for depredations committed in East Florida previous to the entrance into that province of the agent or troops of the United States.*

“SECTION 2. *And be it further enacted, That the judge of the superior court of St. Augustine be, and he hereby is, authorized to receive, examine, and adjudge all cases of claims for losses occasioned by the troops aforesaid, in 1812 and 1813, not heretofore presented to the said judge, or in which the evidence was withheld, in consequence of the decision of the Secretary of the Treasury that such claims were not provided for by the treaty of February 22, 1819, between the governments of the United States and Spain: Provided, That such claims be presented to the said judge in the space of one year from the passage of this act: And provided, also, That the authority herein given shall be subject to the restrictions created by the provisos to the preceding section.*”—(6 *Statutes at Large*, p. 569.)

Under these acts the territorial judges continued to adjudicate this class of claims, until Florida was admitted into the Union as a State, and the territorial courts were superseded by the transfer of the federal jurisdiction which they had previously exercised to the district court of the United States for the northern district of Florida; when, by the 6th section of the act of February 22, 1847, this duty was transferred to the judge of the said district court, as a part of his federal jurisdiction. That section is in the following words:

“That any unfinished business or proceedings now remaining or pending before the judge of the superior court at St. Augustine, as a commissioner under and by virtue of the ‘act for the relief of certain inhabitants of East Florida,’ approved June 26, 1834, or under any other act granting special powers or imposing special duties upon said judge, be, and the same is hereby, transferred to the judge of the northern district of Florida, to be proceeded in and finished, or decided, in the same manner provided by law; and the said district judge shall have, exercise, and possess the same duties, and powers, and rights, which have, by virtue of the act of June 26, 1834, aforesaid, or otherwise, been possessed and exercised by the said judge of the superior court at St. Augustine, so far as may be necessary to enable the said district judge to determine and finish any matter, business, or proceedings now pending and undetermined before the judge of the superior court aforesaid, by virtue of any such special act.”—(9 *Statutes at Large*, p. 130.)

A number of claimants having failed to present their claims within the time limited by the act of June 26, 1834, Congress, on the 3d day of March, 1849, authorized, upon the conditions therein stated, the presentation, *adjudication*, and payment of their claims.

The act is as follows:



“AN ACT for the relief of Peter Capella, administrator of Andrew Capella, deceased, and for the relief of John Capo, and for the relief of Elijah Petty and Hannah Petty, his wife, heirs of John Beardon, deceased.

“SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.* That the judge of the district court of the United States for the northern district of Florida be, and he is hereby, authorized and directed to receive and adjudicate the claim of Peter Capella, administrator of Andrew Capella; and also the claim of John Capo; and also the claim of Elijah Petty, and Hannah, his wife, heirs of John Beardon; and also the claim of Francis P. Ferreira, administrator of Francis Pass, deceased, under the provisions of the act of Congress of the twenty-sixth day of June, eighteen hundred and thirty-four, entitled ‘An act for the relief of certain inhabitants of East Florida,’ and that said several claims may be settled by the treasury, as are other cases under said act: *Provided, however,* That the petition for the allowance of such claim shall be presented to said judge, by the proper parties entitled to prefer the same, within one year from the passage of this act: *And provided, also,* That said parties shall respectively allege in such petition, and prove to said judge reasonable cause for such petition not having been presented within the time prescribed and enacted by said act of June twenty-sixth, eighteen hundred and thirty-four.”—(9 Statutes at Large, p. 788.)

An act similar to the last was passed for the relief of Joseph Arnow, on the 20th day of January, 1853.—(Session Acts of 1853, chap. 23.)

#### ACTION OF THE FLORIDA JUDGES.

Under the above provisions of the treaty and acts passed “to carry it into effect,” the claims in question have been adjudicated. Each claimant presented his claim by petition, verified by oath, and alleging, as required by the rules prescribed by the court, (see Rules, by Judge Reid,) the nature and extent of his losses, and the facts necessary to show that the claim was within the provisions of the treaty. The judge examined the witnesses when personally brought before him, and, when their testimony was taken by deposition, he selected and instructed the commissioners, and propounded cross-interrogatories to the witnesses, as is shown by the record on file in this case, and the records remaining on file in the Treasury Department.

All the evidence was recorded, and a copy of it, and of the decree of the judge, when “*in favor of the claimants,*” was reported to the department for payment, as required by the act of 1823.

In making up his awards or decrees, the judge allowed, as the just and proper measure of damages under the law of nations necessary to fulfil the stipulations of the treaty, the proved value of the property at the time of the injury or loss; and by way of satisfaction for the further loss of the use, fruits, or profits of the property, whilst wrongfully deprived of them, and of the just satisfaction for them which the law of nations required; and, during the period that no provision of law existed for the presentation and payment of said claims, he added five per cent. interest, by way of damages, and as an equitable measure of damages, to the original value of the property, (being the legal rate of the country,) and made a formal decree that the United States

pay the same to the claimants. The decrees thus made *in favor of the claimants*, were, as before stated, reported to the Secretary of the Treasury for payment; when *against them* they were deemed *final*, and were never reported to the Secretary. The report of the Secretary of the Treasury to the Senate shows that more than half the amount of the claims presented, were thus finally disposed of by the judges—thus making the decision of the judges *against* claimants final and conclusive, whatever may have been the effect of decisions *in their favor*.

#### EXECUTIVE AND LEGISLATIVE ACTION UPON THE DECREES OF THE FLORIDA JUDGES.

When these claims reached the treasury, they were subjected to the same scrutiny as claims which had never been adjudicated.\* The Secretaries claimed the right to go fully into the merits of the claims upon the evidence reported, and called upon the judge for further evidence whenever they entertained doubt. In regard to the damages decreed for the loss of the use and fruits of the property, it was rejected, in all instances, under the mere *usage* of the Treasury Department in reference to domestic pecuniary demands, without any reference to the treaty, the law of nations, or the express direction of the act of 1823, which required the Secretary, when he paid at all, to pay the *amount* of the decree.

Secretary Woodbury's first decision, disallowing the damages decreed under the name of interest, was made on the 20th December, 1836, in the case of John Gianopoli, in which, in allowing the claim, he added the words: "with the exception of interest, which it is believed has not been allowed in claims similarly situated."—(1 Vol. Judicial Records, Treasury Department, folio 145. Letter of William L. Hodge, Acting Secretary of the Treasury, to Hon. Wm. A. Graham, dated June 9, 1851. Ex. Doc. No. 68, 2d Sess. 24th Con., H. R.; Ex. Doc. No. 98, 3d Sess. 25th Cong., H. R.)

This decision of Secretary Woodbury was made without argument on the part of the claimants, and continued to be followed by him, without reference to the Attorney General, until the expiration of his term of office.

In 1841, reference was made to Attorney General Crittenden, and to Attorney General Nelson in 1843, as to the propriety of allowing this portion of the damages. The references, as well as the opinions upon them, were made upon the mere usage of the Treasury Department as to the payment of interest upon pecuniary domestic claims, without any reference to the treaty or the law of nations, or that provision of the act of 1823, which required the Secretary, when he paid at all, to pay the amount of the judge's decree.—(Attorneys General Opinions, Vol. 3, p. 635; *Ib.*, Vol. 4, p. 286.)

The practice of Secretary Woodbury, under the departmental usage, having been thus confirmed, has been followed, as a precedent, up to the present time

\* See correspondence between the Hon. A. E. Maxwell, representative from Florida, and McClintock Young, esq., late chief clerk of the Treasury Department, under date of 17th and 31st of February, 1855. For correspondence, see pp. 68 to 72, inclusive, of this document.

On the 28th February, 1849, Secretary Walker referred these questions of the measure of damages to which the claimants were entitled, and the mode in which the treaty required those damages to be established, to the Attorney General, for his opinion thereon, under the treaty and law of nations.—(See his reference of that date.)

In answer to this reference, Mr. Crittenden, who was then Attorney General, (16th April, 1851,) gave an opinion, in which he declared that the law of nations governed the question of the measure of damages to which the claimants were entitled under the treaty, (being the rule adopted by the Florida judges in conformity to that law;) but, he advised the Secretary to follow Mr. Woodbury's precedent, until further action by Congress.—(See Attorneys General Opinions, vol. 5, p. 333 to 354. Also, Mr. Crittenden's letter to Hon. T. Ewing, of March 15, 1851, in which he says:

“That in the cases in question, the *value* of the property lost, with the addition of interest, as a compensation for the deprivation of its use, is a measure of the pecuniary satisfaction to which the injured owner is entitled, in accordance with the laws and usages of nations.”—(Printed papers in “Reddin Blunt's case,” p. 35. See, also, letter of Mr. Nelson to Hon. Wm. Cost Johnson, dated the 6th day of March, 1850; also, opinions of Hon. Messrs. Ewing, Forward, and Spencer, who made the references to the Attorneys General under the usage of the department; also, Judge Bibb's letter to Hon. Wm. Cost Johnson, of June 28, 1851—all concurring in the opinion that the cases were governed by the law of nations, and not by the usage of the Treasury Department, and that the measure of damages awarded by the Florida judges was correct; also, Secretary Meredith's reference to the Attorney General, under the treaty and law of nations, dated 17th June, 1850; also, Secretary Corwin's official statement, of 23d September, 1851, that the law of nations had never been applied by the Secretaries of the Treasury to this class of claims; also, letters of Spanish minister to Secretary of State, of date the 3d December, 1849, and of 12th October, 1850—all on file in the Treasury Department, and sent to the Senate by Secretary of the Treasury.)

On the 4th day of February, 1851, Mr. Secretary Corwin referred all the questions involved in these cases to the Solicitor of the Treasury for a report thereon.—(Reddin Blunt's case, pp. 7 and 8.)

On the 7th day of March, 1851, Mr. Solicitor Clark made an elaborate report, affirming the obligation of the United States to pay the full amount of the decrees of the Florida judges; and also affirming the correctness of the measure of damages decreed by the said judges.—(See official report.)

As the treaty required the claims to be established judicially—after the second opinion of Attorney General Crittenden, and the report of Solicitor Clark—all the questions involved in these cases were referred, by the Treasury Department, back to the judge of the district court of the United State for the northern district of Florida, on whom jurisdiction to adjudicate these claims had been conferred by the act of 1847, above recited, with all the opinions of the Attorneys General on the subject, for a full judicial review of those questions; and the district attorney of the United States for that district, was directed to

represent the United States, and argue the said questions before the judge.

This review took place in the case of Francis P. Ferreira, administrator of Francis Pass, deceased, in which, after full discussion, the finality of the decrees of the judges, and the correctness of the measure of damages decreed by them, were fully sustained by Judge Bronson.—(See printed opinion of Judge Bronson, in the Supreme Court record of that case, p. 30 to 62.)

From this decision an appeal was prayed in behalf of the United States to the Supreme Court, which was dismissed for want of jurisdiction.—(13 Howard, p. 40.)

On the 4th of November, 1853, the same questions were referred by Mr. Secretary Guthrie to Mr. Attorney General Cushing for his opinion thereon.—(See reference in Judge Bibb's printed report to the Attorney General, of March, 1854, pp. 1 and 2.)

Mr. Cushing declined to give an opinion upon the merits of the questions referred; expressed a full concurrence in Mr. Crittenden's opinion of the 16th April, 1851—which sustained the correctness of the measure of damages adopted by the Florida judges; but, like Mr. Crittenden, he set up Mr. Woodbury's precedent, and that of his successors, founded upon it—admitted to have been in violation of the treaty and law of nations, against payment; and advised the Secretary, without any application on behalf of the claimants, and against their wishes, to report the entire class of claims to Congress, for its action thereon.

In pursuance to this advice, the said Secretary sent his report to the Senate, dated the 22d July, 1854, accompanied by Mr. Cushing's opinion, notwithstanding that body had, by a report of its Judiciary Committee, dated the 24th February, 1851, and unanimously concurred in by the Senate, declared, in the case of the legal representative of John Forbes, one of the claimants, that the "acts intended to carry into effect the provisions of the treaty are adequate to furnish relief co-extensive with the obligations thereof, and that no additional legislation is necessary."—(Sen. Doc. No. 82, 1st sess. 33d Congress, for the report of Mr. Guthrie; Sen. Doc. No. —, for that of the Judiciary Committee of the Senate.)

This report of Mr. Secretary Guthrie, with the memorial of Robert Harrison, one of the claimants, was referred to the Judiciary Committee, both in the Senate and House of Representatives. A strong report, affirming the right of the claimants under the treaty, to the payment of the full amount of the decrees of the judges, and in favor of the legality and justice of the measure of damages decreed by them, was made by the Judiciary Committee of the House, accompanied by a joint resolution, requiring the Secretary of the Treasury to pay the said decrees in full out of the general appropriation made by the acts of 1823 and 1834, passed to carry the treaty into effect. This resolution was laid on the table through the misapprehension and consequent *opposition* of a single member, by a vote of 89 to 104, after having been taken up, out of its order, by a vote of 118 to 54.—(Report No. 33, H. R., 2d sess. 33d Cong.; House Journal, same session, p. 368 to 378.)

No report was made by the Judiciary Committee of the Senate ; but the joint resolution, reported in the House of Representatives, was offered in that body as an amendment to the civil and diplomatic appropriation bill near the close of the session, and, after it had been laid on the table in the House of Representatives, and was rejected—the two senators who opposed the amendment, urging the propriety of referring it to the Court of Claims for a judicial decision upon the legal questions involved in this class of cases.

LEGAL PROPOSITIONS, POINTS, AND AUTHORITIES.

It will be contended in behalf of the petitioner—

I. That the treaty required the claims, provided for by the 9th article thereof, to be established judicially, and according to its just obligations under the law of nations; and bound the United States to pay the damages which should be so established.

II. That the acts above recited were intended to carry the said article of the treaty into full and complete effect, by providing for the adjudication and establishment of the said claims, by the judges in Florida; and for the payment of the amount of the decrees of the said judges, by the Secretary of the Treasury, when within the provisions of the treaty, and, consequently, within the jurisdiction of the said judges.

III. That the claim of the petitioner's intestate, with others, has been judicially established by the judges in Florida, as the treaty required, and as the acts provided—as shown by the record on file in this case.

IV. That by the payment of the original value of the property, as decreed by the judges in Florida, by the Secretary of the Treasury, in the case of the petitioner's intestate, and others, it has been decided, in the mode prescribed by law, that the said claims, including that of the petitioner's intestate, are just and equitable, within the provisions of the said treaty; and the petitioner is, therefore, entitled to the payment of the residue of the decree made in favor of her intestate's estate, as shown by the record on file in this case.

V. That the measure of damages decreed by the Florida judges, is the just and legal one to which the petitioner's intestate is entitled, under the provisions of the treaty, the law of nations, and the acts of Congress passed to carry the treaty into effect; and that the petitioner is, therefore, entitled to the payment of the residue of the decree made in favor of her intestate's estate, as shown by the record on file in this case.

The foregoing propositions will be sustained by the following points, and authorities:

1. The treaty between the United States and Spain of the 22d Feb-

ruary, 1819, and the law of nations, are the source of all right to the claimant.

Const. U. S., art. 6, sec. 2; Rutherford, book 1, ch. 1. sec. 13; 1 Blk. Com., p. 43; 4 ib. pp. 66, 67; Wheaton on International Law, chap. 1, p. 46, et ult, pp. 308, 309, 334, sec. 17. 1 Kent's Com., 5th edition, pp. 68, 69, 70, 173, 174, 175. Grotius, book 2, chap. 16. Vattel, book 2, chap 17. Rutherford's Inst., book 2, chap. 7. 9 Cranch, p. 191. 2 Cranch, p. 64. 9 Cranch, p. 244, where the Supreme Court say, "The court of prize is emphatically a court of the law of nations, and it takes neither its character nor its rules from the mere municipal regulations of any country." 2 Dallas, p. 1, "That the municipal laws of one country cannot change the law of nations so as to bind the subjects of another nation." Vattel, book 2, chap. 12, sec. 162, "That the law of nature alone regulates the treaties of nations." Opinion of Attorney General Wirt, old opinions, p. 635. Opinion of Attorney General Crittenden in Reddin Blunt's case, Attorneys General Opinions, by Farnham, vol. 5, p. 333, that "the compacts of nations can be governed only by the law of nations;" and that to apply "local law or local usage" would be a "violation of the most indisputable principles of the public law." Senate doc. No. 82, 1 sess., 33 Cong., p. 13, for Attorney General Cushing's concurrence in the Opinion of Attorney General Crittenden; Lieber on Construction, Am. Jurist, vol. 18, pp. 91, 92, &c.

2. That the satisfaction which the treaty stipulates is to be decided and measured by the law of nations, and not by the usage of the Treasury Department.—(*See authorities under first point.*)

3. That the losses occasioned by the invasion of East Florida, in 1812 and 1813, are within the provisions of the treaty, and are recognized to be so by Congress:

See Am. State Papers, For. Rel., Vol. 4. No. 311, particularly pp. 465-'6, being Mr. Onis' letter of January 24, 1818, to the Secretary of State; also p. 467, ditto to ditto, of February 10, 1818; Ibid, p. 475, being a reply of the Secretary of State to the foregoing letters, under date of March 12, 1818; p. 485-'6, being a reply of Mr. Onis to the last named letter of the Secretary of State; report of Mr. Everett from Committee on Foreign Relations, Ho. Rep., No. 99, 2 sess., 20 Congress; Mr. Archer's report from Committee on Foreign Relations, Ho. Rep., No. —, — sess., — Congress, made March 26, 1834; act of March 26, 1834; Senate rep. 222, 2 sess. 29 Cong., report of Judiciary Committee; Senate rep. 165, 1 sess, 30 Cong., report of Mr. Webster, from Committee on Foreign Relations; report of Mr. Downs, from Judiciary Committee of the Senate of February 24, 1851, in the case of John Forbes; Ho. Rep. No. 33, 2 sess. 33 Cong., report Judiciary Committee in case of Robert Harrison and others; Secretary Woodbury's report, Ex. Doc., No. 98, 3 sess. 25 Cong.; Opinions of Attorneys General, before referred to; opinion of Mr. Legare, Att'y's Gen'l Opinions, vol. 3, p. 677—721; Mr. Crittenden's brief in Supreme Court, in case of Ferreira, p. 1; opinion of Supreme Court in

in same case, 13 Howard, 40 ; opinion Attorney General Cushing of June 9, 1854, that—

“The act of 1834 was particularly intended to declare and to define the import of the word ‘late.’”—Senate Doc. No. 82, 1 sess. 33 Cong.

4. The treaty requires the amount of the damages, or satisfaction, to be established judicially.

That the words, “by process of law,” in the above clause of the treaty, being technical words borrowed from common law, must be referred to that code for their true meaning, see Campbell’s *Grotius*, vol. 2, chap. 16, “On the interpretation of treaties,” sec. 3 ; Vattel, book 2, chap. 17, sec. 276 ; Puffendorff, book 5, chap. 12, sec. 4 ; Wheaton’s *International Law*, p. 334, sec. 17 ; 1 Kent’s *Com.*, p. 163, 174 ; 3 Washington’s *C. C. Rep.* p. 215 ; Dwarrris on *Construction of Statutes*, p. 702 ; also Vattel, book 2, chap. 17, sec. 267—282, 283 ; 6 Peters, 743, *U. S. vs. Arrendondo et al.* ; also 691 same case ; 2 Att’y. Genl’s. *Op.*, p. 198.

For the meaning of these words in the common law, and in our Federal and State Constitutions, see 2 Kent’s *Com.*, 6th edition, p. 13, note b ; Judge Tucker’s *Com. on Const. U. S.*, Tucker’s *Black.* vol. 1, part 1, appendix 203 ; *Exparte John and Cherry streets*, 19 Wendell’s rep. p. 676, in the Supreme Court of New York ; *Taylor vs. Porter*, 4 Hill, p. 146, in same court ; Coke’s *Inst.*, p. 50 ; *Magna Charta*, ch. 29 ; Story’s *Com.* 2 vol., sec. 1789 ; *Hoke vs. Henderson*, 4 Devereux, p. 15 ; Judge Bronson’s opinion in case of *Ferreira* ; adm., &c., p. 24 to 31 ; 5 Amend. *Con. U. S.* ; opinion of Solicitor Clark, before cited ; 6 of the Kentucky resolutions of 1798, (drawn by Mr. Jefferson) ; 4 Elliott’s debates 541 ; Mr. Madison’s report on the Virginia resolutions, *Ib.* pp. 553, 554, 560.

5. The “satisfaction” stipulated by the treaty, means the full measure of damages which the law of nations recognizes and prescribes as a just indemnity for injury to property.

See Wheaton on *International Law*, pp. 340, 341, 342, 567 ; 1 Kent’s *Com.* 5th ed., p. 61 ; Vattel, book 2, chap. 18, sec. 524 ; *ibid.* book 3, chap. 11, sec. 185 ; Campbell’s *Grotius*, book 2, chap. 17, p. 192 ; Rutherforth, book 1, chap. 17.

6. The measure of damages adopted by the Florida judges, in this and other cases of the class, to wit, the proved value of the property at the time of its loss or destruction, with interest, at the legal rate of the country, as a satisfaction for the further damage occasioned by the loss of the annual use and fruits of such property, or of its value, is the most mitigated measure, recognized by the law of nations, as a satisfaction for such injuries.

First. To show that the deprivation of the use and fruits of the property unlawfully taken or destroyed, forms as essential a part of the “injury” for which the treaty stipulates “satisfaction” as the loss of the property itself ; and that the rule of damages adopted by the Florida judges is uniformly sanctioned by writers on the law of nations.—See Rutherforth’s *Institutes*, book 1, chap. 17, secs. 5 and 8 ; Campbell’s *Grotius*, vol. 2, chap. 17, sections 4 and 5 ; Vattel,

book 2, chap. 18, sec. 342; Wheaton's International Law, part 4, chap. 1, sec. 3; Wheaton's Life of William Pinkney, pp. 261, 262; Puffendorff, book 3, chap. 1, sec. 9, p. 312.

Second. That it is uniformly sanctioned and insisted upon by the United States, in the construction of its treaties, and in its diplomatic intercourse with other nations: See opinion of Attorney General Wirt, in the cases arising under the Convention with Great Britain to carry into effect the award of the Emperor of Russia; Farnham's edition, vol. 2, p. 28 to 34; Letter of Mr. Clay, Secretary of State, to Mr. Vaughan, British Minister, dated 15th April, 1826, certified by State Department; Opinions of Langden Cheves, American Commissioner, as cited by Judge Bronson, in the case of Ferreira, p. 18, of the Opinion, also, his estimate of interest for the Secretary of State, of 26th April, 1825, certified by State Department; Wheaton's Life of William Pinkney, pp. 196, 198, 265, (note) 371; Am. State Papers, Foreign Relations, vol. 2, pp. 119, 120, 387, 388, 283; Ex. Doc. No. 32, 1st sess. 25th Cong., Ho. Reps., p. 249; Ex. Doc. Ho. Reps., 2d sess. 27th Cong., vol. 5, No. 291, p. 50; Am. State Papers, Foreign Relations, vol. 4, p. 639; Elliott's Diplomatic Code, vol. 2, pp. 605; 8 Stats. at Large, pp. 119, 150, 249, 526. For cases of the "Encomium" and "Comet," see Senate Doc. No. 174, 3d sess. 24th Cong.; Senate Doc. No. 216, 3d sess. 25th Cong.; Senate Doc. No. 119, 1st sess. 26th Cong.; President's Message, 26th August, 1842, with the Report of the Commissioners, Hon. Wm. L. Marcy, Judge Rowen, and afterwards Judge Breckenridge; Ex. Doc. No. 291, Ho. Reps. 2d sess. 27th Cong., vol. 5, p. 30, and tabular statements, from p. 50 to 61, in relation to the treaty with Mexico of 11th April, 1839; see report and decision of the Board of Commissioners for the adjustment of claims under the treaty with Mexico of 2d February, 1848, on file in the State Department, and the tabular statement from that department, dated July 11, 1851, certified by James S. Mackee, then keeper of the archives thereof, containing the amount of interest on the several awards made by the said commissioners, according to the rule adopted by the judges in Florida; opinion of Attorney General Grundy, Old Opinions, pp. 1225, 1226.

Third. That the same rule has been sanctioned by the Supreme and other courts of the United States in deciding cases arising under the law of nations.—(See *The Amiable Nancy*, 3 Wheat., pp. 546, 560; *Anna Maria*, 2 Wheaton, pp. 327, 335; *The Appoleon*, 9 Wheaton, pp. 362, 377; 1 Gallison, p. 315, *The Lively*; *The Charming Betsey*, 2 Cranch, p. 125; *Maley vs. Shattuck*, 3 Cranch, pp. 474, 491, 492; *Del. Col. vs. Arnold*, 3 Dallas, pp. 333-'34.)

The admiralty courts of Great Britain concur in this rule.—(See the case of the *Acteon*, 2 Dodson, p. 84; *The Lucy*, 3 Robinson, p. 208; *The Driver*, 5 Robinson, p. 145.)

That the rule is the same in the French Council of Prizes.—(See the case of the *Pigou*, 2 Cranch, p. 98 to 101, reported in note to the *Charming Betsey*.)

That courts exercising admiralty jurisdiction, including the courts of the United States, are governed by the laws and usages of nations.—



(See 1 Kent's Com., pp. 18, 19, 68, 69, 70; Wheaton's International Law, p. 47; 9 Cranch, 244; Ib. 191.)

In concluding our citations of these leading authorities we add the language of Chancellor Kent: "In cases where the principal jurists agree, the presumption will be very great in favor of the solidity of their maxims; and no civilized nation that does not arrogantly set all ordinary law and justice at defiance, will venture to disregard the uniform sense of established writers on international law."—(Kent's Com., pp. 18, 19.)

7. The rule of damages adopted by the Florida judges is the just and legal one in cases governed by the common or civil law, as well as in cases governed by the law of nations.

That the rule is the same in actions of *tort* for injuries to property, both in the United States and in England, and both in the federal and State courts.—(See *Conrad vs. Pacific Insurance Co.*, 1 Baldwin, C. C. Rep., p. 138; S. C., 6 Peters, pp. 273, 282; Sedgewick on the Measure of Damages, pp. 549, 550, 551, 517, that "interest seems to be usually given by way of damages for the detention of property;" *ib.*, pp. 214, 498, 499, 519, 520, 548, 570, 586, 587; chap. 19, generally; Greenleaf on Evidence, vol. 2, pp. 591, 612, 282, sec. 276; *Church vs. Cherryfield*, 33 Maine Rep., p. 457; *Soule vs. White*, 14 Maine Rep., p. 436; *Hammett vs. Russ*, 4 Shepl., p. 171; *Kennedy vs. Whitwell*, 4 Pick., p. 466; *Greenfield vs. Leavitt*, 17 Pick., p. 3; *Barry vs. Bennett*, 7 Metcalf, pp. 354, 363; *Boyden vs. Moore*, 11 Pick, p. 363; *Swift vs. Barnes*, 16 Pick., p. 194; *Boyd vs. Brown*, 17 Pick., p. 453; 21 Pick., p. 559; 1 Metcalf, p. 172; 14 Pick., pp. 356, 361; 15 Pick., pp. 198, 206, 207, 297, 300; *White vs. Webb*, 15 Connect. Rep., p. 365; 19 do., 319; *Wilson & Gibbs vs. Conine*, 2 Johns. Rep., 282; 14 Johns. Rep., 273; *ib.*, vol. 15, pp. 198, 206; *Bissell vs. Hopkins*, 4 Cowan, p. 52; 2 Hill, p. 132; *Hyde vs. Stone*, 7 Wend., pp. 354-5; *Dillenback vs. Jerome*, 7 Cowan, pp. 294, 300; *Beals vs. Guernsey*, 8 Johns. Rep. 446; *Baker vs. Wheeler*, 8 Wend., 505; *Hebburn vs. Sewall*, 5 Harris & John., 212.

*Pope vs. Campbell*, Hard. p. 31; *Meed vs. Phillips*, Littell's Select Cases, p. 50; *Outton vs. Barnes*, *ib.* 136; 7 Monroe, 209; 3 Bibb, p. 92; 3 Littell, p. 25; 4 Dana, p. 162, *Glasscock vs. Hays*; *Banks vs. Hatton*, 1 Nott & McCord, p. 222; *Talbird vs. Baynard*, 2 Hill, S. Car. Rep. 599; *St. John vs. O'Connell*, 7 Porter, (Ala.) Rep. p. 481; *Eakins vs. The East India Company*, 1 Pr. Wm's, p. 395; 2 Brown's Parl. Cases, p. 72. S. C.; 2 Eq. Cases Abr., ch. 1, p. 534; 11 Campbell, p. 477, per Lord Ellenborough.

That the rule is the same under the civil law, and that "fruits or profits were awarded in cases of wrongful taking or detention of property," as part of the damages by Justinian, liber 22; liber 17; Cod. liber 3, c. De Condit, ex. leg.; Domat, book 3, title 5, sections 1 and 2, vol. 1, p. 406, sec. 13, pp. 407, 408, sec. 18.

8. It was the declared intention of Congress, by the above recited acts, to carry the 9th article of the treaty into full and complete effect. (See acts passed to carry the treaty into effect; Opinion of Attorney

General Nelson, 4 vol. Attorneys General Opinions, by Farnham, pp. 286 to 294.)

9. The acts are all to be construed together as one act, *in pari materia*, and in subordination to the provisions of the treaty.

Dwarris on the Construction of Statutes, p. 699; Attorney General Wirt's Opinion under the Convention of St. Petersburg, old edition, 568 to 571; Lieber on Construction, 18 Am. Jurist, p. 67 to 92; 2 Story on Construction, sec. 1838, pp. 570, 571, 572; Ordinance of 1781, 5 Wheaton, App., p. 126.

For general rules of construction, see Dwarris pp. 663, 690, 691, 692, 698, 702, 703, 718, 704, 713, 755, 756, 757, 760, 759, 762, 753, 660, 765, 768, 769, 730; Pothier on Obl., part I, ch. 1, sec. 1, art. 7, rule 2.

Bend vs. Hoyt, 13 Peters, p. 263 to 273; Talbot vs. Seaman, 1 Cranch, p. 43; The Charming Betsey, 2 Cranch, p. 118; Fisher vs. Blight, 2 Cranch, p. 390; Pennington vs. Cox, 2 Cranch, p. 33; Lincoln College case, 3 Coke, 59, b.; Co. Litt., 381, a; 4 Bac. Abr. Statute (1,) plea 7, 645; Stowell vs. Zouch, Plowden, 365.

10. The acts of Congress required the Florida judges to act in the judicial character previously conferred upon them by their appointment as judges, and in that capacity to establish the claims as the treaty required.

See Treaty and Acts heretofore cited; also Act of 30th March, 1822, establishing territorial government in Florida, Stats. at Large, vol. 3, p. 656; Act of 24th September, 1789, and 2d March, 1793, 1 Stats. at Large, pp. 73, 333; Story on Const., vol. 2, sec. 1777, authorities there cited, p. 526; Ib., sec. 1627, p. 411; Constitution United States, art. 2, sec. 2; 4 Black. Com., pp. 265, 269; 9 Howard, 245; Benner vs. Porter; Treaty of 1819, 11th art; 3 Stats. at Large, p. 710; Am. Insurance Company vs. Conter, 1 Peters, p. 546, and authorities ante and post; Opinion of Attorney General Gilpin, (old,) 1361, 1362; Civil Code of Louisiana, art. 3522, note 20, p. 355; 2 Story's Com., sec. 1627, p. 411; Ib., sec. 1729, p. 487; United States vs. Nourse, 6 Peters, 470; United States vs. Vorhees, 10 Peters, p. 449 to 478; United States vs. Cox, 11 Peters, 162; United States vs. Randolph, 2 Brock., 447.

11. The duties to be performed by the judges in establishing these claims as the Treaty and Acts required, was of a strictly judicial character, and the jurisdiction of the courts, of which they were the respective judges, extended to "all cases arising under the Constitution and laws of the United States," which embraced this class of claims.

(Acts establishing said court and authorities as cited.)

12. A proceeding by petition, as prescribed by Congress and adopted by the Florida judges in adjudicating these claims, was a proper judicial process to fulfil the treaty.—(See 6th section of the act of 23d May, 1828, 4 Statutes at Large, p. 285, by which the land claims in Florida were to be brought before the courts for adjudication by peti-

tion; also, acts for the adjudication of the land claims in Missouri, Arkansas, Louisiana, &c.; 2 Story's Com. on Constit., sec. 1725, p. 485; *Osborn vs. The Bank of the U. S.*, 5 Wheaton, 747; *Weston et al. vs. City Council of Charleston*, 2 Peters, 464; *Rhode Island vs. The State of Massachusetts*, 12 Peters, 750, 751; 4 Statutes at Large, p. 165, sec. 4; 1 ib., p. 83, sec. 17; Dwarries, general rules for construing statutes, 7, 8, 10, pp. 662, 663; 3 Black. Com., ch. 17, pp. 256-'57, petition of right, *monstrans de troit*; Staunf. P. C., ch. 15; Skinner, pp. 608, 609; Rastell Entr., p. 461; 4 Rep., p. 55; Tidd's Practice, p. —; act of 3d March, 1849, for the relief of Peter Capella and others, 9 Statutes at Large, p. 788.)

13. Congress cannot be presumed to have legislated for the purpose of defeating the treaty, when there has been a declared purpose to carry it into effect, and a series of acts passed for that purpose. Nothing can be implied against such a series of acts of that character. (*The Emily and Caroline*, 9 Wheaton, 388; Vattel, book 2, chap. 17, sec. 282.)

14. The treaty binds the United States to pay the amount of the damages, so established, on cases within the provisions of the treaty. 9th article of the treaty of 1819; Opinion of Attorney General Legare; of Dec. 7, 1841, Attorneys general Op., (by Farnham,) vol. 3, p. 721; Report of Mr. Dean, from the Committee on Territories, in the Ho. Reps. in 1842; Act of 3d March, 1823, requiring the Secretary to pay the amounts of the judges' decisions, when within the treaty.

Opinion of Attorney General Legare, of 4th August, 1842, in the case of William Otis, Op. Att's General, vol. 2, p. 1520; Co. Litt., 212, b; Pinnell's case, 5 Coke, 117.

The judgment of a court of competent or peculiar jurisdiction cannot be questioned collaterally, but only by an appellate judicial tribunal.—(*Gelston et. al. vs. Hoyt*, 3 Wheaton, 246, and authorities generally.)

14. It was the evident intention of Congress, by the acts passed to carry the treaty into effect, to authorize and require the Secretary of the Treasury to pay whatever the judges might lawfully decree under the said treaty.—(First and second sections act of 3d March, 1823.)

16. The acts of Congress required the Secretary of the Treasury to act in his ordinary executive character, as such Secretary, and in the capacity in which he had been previously appointed.—(See acts, and 2d sec. 2d art. Constitution, and authorities ante and post.)

17. The only power of the Secretary, over the decisions reported to him by the judge, was to ascertain, from the evidence, whether the claims were within the provisions of the treaty; and if he found them to be so, to pay "the amount thereof;" and if not to reject the same for that reason.—(Acts of 3d March, 1823, and 26th June, 1834, and authorities cited to show that the acts must be construed in subordination to the treaty; Constitution U. S., art. 2, sec. 2; 2 Story on Const., sec. 1777, p. 576, and authorities there cited.)

18. The three great powers of the government—the legislative, executive and judicial—are separate, distinct, and independent of each other.—(Constitution U. S. art. 1, sec. 1; art. 2, sec. 1; art. 3, c. 1.)

The superior courts of the Territory of Florida were, and the district courts of the United States in that State are, judicial tribunals, and as such, belong to systems derived from the Constitution of the United States; and the Secretary of the Treasury could not exercise jurisdiction with them, nor appellate jurisdiction over their decisions.

Constitutional courts belong to the judicial system of the United States, within the 3d article of the Constitution. Legislative courts are derived from the general powers of Congress over Territories; they are, therefore, derived from the Constitution, and are invested with all the qualifications which separate the judiciary powers from the other great powers of the government.

The jurisdiction of legislative courts “is conferred by Congress in the exercise of their general powers which that body possesses over the Territories of the United States.” They are competent to receive and exercise whatever powers Congress may confer for redressing civil injuries, or restraining and punishing public wrongs; and could, therefore, exercise all the powers conferred by the acts of Congress to carry the treaty into effect.—(Am. Insurance Company, *vs.* Canter, 1 Peters, p. 546; *Martin vs. Hunter*, 1 Wheaton, p. 327 to 330; 4 art. sec. Constitution U. S.; 1 art. 9th sec. Constitution U. S.; 2 art. 2 sec. Constitution U. S.; act of 1789, establishing judicial system U. S., 1 Stats. at Large, p. 73; act of 1789, establishing Treasury Department, 1 Stats. at Large, p. 65; stat. 16 Charles I., ch. 10; 1 Black. Com., p. 266 to 269; 4 Inst., p. 71; 3 Story’s Com., p. 355; 11th art. treaty of 1819, last clause; acts to carry treaty into effect; opinions of the judges under the pension act of 1792, as cited; *Murray vs. Madison*, 1 Cranch, 137.)

19. Congress could not, constitutionally, confer judicial power upon the Secretary of the Treasury, as Secretary; nor could they clothe him with power, as an executive officer, to revise judicial decisions.—(Authorities cited.)

20. The acts of Congress, therefore, authorized and required the exercise of all the judicial power necessary to establish the said claims, agreeably to the provision of the said treaty, by the Florida judges; and conferred no judicial power, appellate or otherwise, upon the Secretary of the Treasury.

21. Neither the stipulations of the treaty nor the acts of Congress passed to carry it into effect, will warrant the injustice of making the decisions of the judges, when against claimants, final, and of no validity when in their favor.—(See acts, that decisions against the claimants are not to be reported to the Secretary of the Treasury.)

22. The Secretary, by paying the original value of the property, as decreed by the judges, has decided the claims to be “just and equi-

able within the provisions of the treaty," and thus foreclosed that question (That the right to the interest decreed by the judges, by way of damages, for the loss of the use and fruits of the property, is a pure question of law under the treaty, to be decided by the laws and usages of nations, see the authorities cited.)

23. If the Secretary of the Treasury had authority to revise the decision of the Florida judge, made in accordance with the treaty, the acts to carry it into effect, and the law of nations; yet, as he did not allow and pay the full measure of damages so decreed in favor of the claimant, this court is bound to decree, according to the said treaty, acts, and law of nations, that the said claimant is entitled to the payment of the residue of said decree.—(See act of 24 February, 1855, organizing the Court of Claims, and authorities before cited; 2 Story, on Const.; sec. 1675, 1676, 1677, 1678, 1679. *Ib.* sec. 1574, p. 365, note 3.)

24. The Secretary of the Treasury, by applying the usage of the Treasury Department to these treaty cases, and by rejecting, under that usage, an essential part of the satisfaction stipulated by the treaty, and established by process of law, violated both the treaty and the express direction of the acts under which he proceeded—which acts directed him to the provisions of the treaty for his guide, and not to the usage of the Treasury Department.—(See authorities under 1st and 2d points, also treaty and acts. Lieber on Precedents, 18 vol. American Jurist, 286 to 293; 10 Peters, 95; *Ib.* 153; Hob. 270; 4 Coke, 94; Bouvier's Law Dict., Title Precedent, p. 349; Title Reason, p. 408; *Ib.* p. 525, Title Stare Decisis; 1 Kent, 476.)

25. The usage which the Secretary applied was not applicable to this class of claims—(damages for injury to property)—if they had been domestic claims, and governed by the municipal laws and usages of the United States, instead of being international claims, governed by the law of nations.

There is no rule of the Treasury Department against the payment of interest, by way of damages, as a measure of satisfaction for injuries to property, under acts of Congress containing no express provision for its payment.

It was paid under the act of 2d July, 1836, for the relief of Mrs. O'Sullivan, upon an opinion of Attorney General Butler, under a direction in the act to pay the "actual loss."—(6 Stats. at Large, p. 697; printed Opinions of Attorneys General, old edition, p. 1115.)

It was paid in Sibald's case, under the act of 23d August, 1842, by the direction of Attorney General Nelson, under a direction in the act to ascertain "the *actual damages* which Charles F. Sibald has sustained and would be entitled to recover upon the principles of law, as applicable to *similar cases*, by reason of the interference of any agent or agents of the United States, acting under their authority, with the use, possession, or enjoyment of his lands, timber, mills, or other property in East Florida."—(6 Stats. at Large, p. 864; Ex. Doc. No.

68, 2d session, 32d Congress, p. 27; Attorneys General Opinions, p. —; same House Doc. No. 68, p. 27.)

It was paid to George Fisher's legal representative, under the act of 12th April, 1848, under a direction of said law, requiring the Auditor to adjust his claims for property taken or destroyed by the troops of the United States in 1813, "on principles of justice and equity, and so as to afford a fair and full indemnity for all losses and injuries occasioned by said troops."—(6 Stats. at Large, p. 712; Attorneys General Opinions, vol. 2, p. 2139.)

For the rule of the department, see opinion of Attorney General Taney of 10th September, 1831.—(Op. Att'ys Gen., vol. 1, p. 785.)

For numerous instances where Congress has provided expressly for the payment of interest in cases of tort, see Am. State Papers, vols. 1 and 2, Miscellaneous.

That in all other cases where the same measure of damages has been awarded under treaties, as a satisfaction for injury to property, it has been paid at the Treasury Department.—(See authorities cited under 6th point.)

That the usage of the Treasury Department in the Florida cases, being in violation of the usage in other treaty cases, and in violation of the treaty and law of nations, is nugatory.—(See *Money et al. vs. Leach*, 3 Burr, 1747; *United States vs. Buchanan*, 8 Howard, 102; *Cowan*, vol. 2, pp. 707, 748; 16 John, p. 374; Leigh's (Va.) R. 632.)

26. If it were conceded that the injuries of 1812 and 1813 were not embraced by the treaty, and were not recognized to be within it by Congress, still, as they have been recognized by Congress to be international injuries, committed in violation of the law of nations and the then subsisting treaty with Spain, for which the United States are bound to make indemnity; and as Congress has directed them to be adjudicated and paid, under the act of 1823, precisely like the injuries of 1818, the law of nations would govern the measure of damages.—(See authorities cited.)

27. The opinion of Mr. Chief Justice Taney, in the case of the United States, appellant, *vs. Ferreira*, adm'r. of Pass, (13 Howard, p. 40,) is not authority: because—

1. The decision of the court was, that it had no jurisdiction; and the opinion does not go to the point presented for decision, and to the conclusion of the judgment.—(See *Cohens vs. Virginia*, 6 Wheaton, pp. 399, 400; Vaughan, p. 382; Yale Todd, Supreme Court U. S., 17th February, 1794; Const. U. S., 2 art., 2 sec.; *Wiscart et al.*, pl's in error, *vs. Dauchey*, def. in error, 3 Dallas, pp. 321 to 327, and so on; *United States vs. Benjamin More*, 3 Cranch, 159, and so on; *United States vs. Goodwin*, 7 Cranch, pp. 110, 111; *The Mary*, 9 Cranch, 144; *Ram. on Legal Judgment*, pp. 36, 37, 48, 49, 50, 116, 121, 122.)

*Elliot vs. Pearsol*, 1 Peters, 340, 341; *Thompson vs. Tolmie*, 2 Peters, 163; *Wilcox vs. Jackson*, 13 Peters, 511; *Rose vs. Himely*, 4 Cranch, 269; *Lessee of Hickey vs. Stewart*, 3 Howard, 762, 763,

that the decisions of tribunals having no jurisdiction are simply void; they confer no right, and conclude no right.

2. A power given by the Constitution to Congress cannot be so construed as to authorize the destruction of other powers given in the same instrument; and therefore no act of Congress can be construed to have been so intended.—(3 Story's Com. Const., pp. 355, 356.)

3. An act of Congress cannot be so construed as to confer supervisory powers upon a Secretary of the Treasury over the proceedings of a judicial tribunal. It would be the destruction of the power given by the Constitution to Congress, to vest the judicial tribunals with all the judicial power. It would overthrow fundamental principles; and therefore the acts of Congress must be so construed as not to admit of such absurd consequences.—(Martin vs. Hunter, 1 Wheaton, pp. 327, 328 to 330, and so on; United States vs. Fisher, 2 Cranch, 358; Darriss on Stats., p. 755; Paine's C. C. Rep., p. 11.)

4. The Supreme Court, by its own decision, had *no jurisdiction* in said case; and its decision is only authority to show that it had no jurisdiction. The Supreme Court itself declared that "the *only* question now before us is, whether *we have any jurisdiction*," (p. 46;) the legal authority of the case, therefore, only goes to that single point.—(Cohens vs. The State of Virginia, 6 Wheat., p. 377; Bole vs. Horton, Vaughan, p. 382.)

5. The opinion of the Supreme Court, in the case of Ferreira, was founded upon a supposed decision in Hayburn's case, (2 Dallas, 409;) whereas *no decision was ever made in that case*.

6. The opinion was founded on certain *extra-judicial* opinions set forth in a note to Hayburn's case, which were not judicial authority, and which were overruled by the decision of the Supreme Court of the United States in the case of Yale Todd, which case was unknown to the Supreme Court when the decision in the case of Ferreira was pronounced.—(See note to the decision in the case of Ferreira, 13 Howard, pp. 52, 53; Ram. on Legal Judgment, p. 183; 2 Brod. & B., 593, 594; 7 Price, 503.)

7. The opinion was founded on the unconstitutional assumption that Congress could, by law, appoint commissioners to decide claims to indemnity under a treaty, without a nomination by the President or a confirmation by the Senate.—(Const. U. S. art. 2, sec. 2.)

8. The opinion was founded on the illegal assumption that judges of the United States could act as commissioners; which was overruled by the unanimous decision of the Supreme Court of the United States in the said case of Yale Todd.—(2 Story Com. Const. sec. 1777, and authorities there cited.)

9. The opinion was made upon the assumption that the act of 1823 did not make "the provisions of the treaty" obligatory upon the Florida judges, in the adjustment and decision of the claims arising under the 9th article of the treaty.—(See act March 3, 1823.)

10. The opinion was founded upon the erroneous assumption that the acts passed to carry the 9th article of the treaty of 1819 into effect required the claims, or injuries, for which the treaty stipulated satisfaction, to be adjudicated and established by the Secretary of the Treasury, and not by the judges.

11. The opinion was made upon the illegal assumption that "the authority conferred on the respective judges was nothing more than that of a *commissioner*, to adjust certain claims against the United States; and *the office of judges*, and *their respective jurisdictions*, are referred to in the law merely as a *designation of the persons* to whom the authority is confided, and the territorial limits to which it extends."

12. The opinion was made upon the illegal assumption that "the treaty meant nothing more than the tribunal and mode of proceeding *ordinarily* established on such occasions," meaning an ordinary board of commissioners, such as was provided for by the 11th article of the said treaty.—(See 9th and 11th articles of treaty and acts to carry them into effect.)

13. The opinion was made upon the erroneous assumption that no process was required to bring the claims before the court, and that "the acts of Congress require no petition" for that purpose.—(See act of March 3, 1849, 9 Stats. at Large, p. 788.)

14. The opinion was made upon the erroneous assumption that "the question as to the construction of the law" of 1792 "*was not decided in the Supreme Court.*"—(See certified copy of decision of Supreme Court, in the case of Yale Todd, of February 17, 1794.)

15. The opinion was made upon a misunderstanding of the extra-judicial opinions of the judges in the note to Hayburn's case; and also as to the acquiescence of the executive and legislative departments of the government, at that time, in the opinion that the judges could act as commissioners under the act of 1792.—(For repealing act of February 28, 1793. and joint resolution of June 9, 1794; see them cited *post*.)

16. The opinion was founded upon the erroneous assumption that the acts of 1792 and 1823 were "the same in principle."—(See the *acts*.)

17. The opinion erroneously assumes that "neither the evidence or the award are to be filed in the court in which he (the judge) resides, nor recorded there; but he is required to transmit both the decision and the evidence upon which he decided, to the Secretary of the Treasury."—(See act of March 3, 1823, and the record on file in his case; *Rhode Island vs. Massachusetts*, 12 Peters, 750, 751.)

18. The opinion relies upon the extra-judicial opinions or letters of the judges, addressed to President Washington, to be laid before Congress; which opinions were not given in any case brought judicially before the judges, and were given without argument or judicial deliberation, and which were, after full argument and judicial deliberation, unanimously overruled in the Supreme Court, by the same judges, in the case of Yale Todd.—(Am. State Papers, vol. 1, Miscellaneous, pp. 49, 50, 51, 52, 53, 78; special message of President to Congress of Nov., 1792, Ho. Journal, vol. 1, pp. 614, 649, 659, 666; Annals of Congress, 2d Congress, from 1791 to 1793, pp. 556, 557, a memorial of Hayburn to Congress; same book, p. 803, for amendment requiring judicial decision by Supreme Court; *ibid*, 3d Congress, Supreme Court decision in Todd's case, reported to Congress by Secretary of War; for Pension act of March 27, 1792, see 2d vol. Laws U. S., 1 Stats. at Large, p. 243; for act repealing same, see



Stats. at Large, vol. 1, p. 324; for joint resolution of Congress of June 9, 1794, rejecting all pension claims allowed by judges as commissioners under the aforesaid act of 1792, see Stats. at Large, vol. 1, p. 401; Ram. on Legal Judgment, p. 183; 2 Bing., 292, 297, 303.)

19. The first opinion, delivered before the case of Yale Todd was brought to the attention of the court, shows that the case of Ferreira was disposed of without full examination, upon the authority of the extra-judicial opinions of the judges set forth in the notes to Hayburn's case. That opinion declared that "the question as to the character in which a judge acts in a case of this description is *not a new one*. It arose as long ago as 1792, in Hayburn's case, reported in 2 Dallas, 409," (p. 4.) After setting forth these extra-judicial opinions, which had been overruled by the Supreme Court in Todd's case, the opinion adds: "After the decision thus made in 1792, and acquiesced in at the time by the other departments of the government, we think that the question must be regarded as *settled*, and not now *open to controversy* under the act of 1823."—(Printed opinion first delivered, on file in the office of the clerk of the Supreme Court.)

20. The note appended to the said decision "by order of the court," after the decision in the case of Yale Todd was brought to its notice, divests the said decision of all authority, and leaves the decision of the Supreme Court in the case of Yale Todd—that the judges could not act as commissioners under the act of 1792—in full and unimpaired force.—(See note.)

21. The opinion is not authority, because of various other mistakes of law and of fact apparent on its face.—(1 Stark. Ev., pp. 257, 260 to 308.)

CHARLES E. SHERMAN,  
A. ANDERSON,  
*Counsel for Claimant.*

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[From the Washington Union of February 25, 1855.]

#### FLORIDA CLAIMS.

HOUSE OF REPRESENTATIVES,  
February 23, 1855.

*To the Editor of the Union:*

DEAR SIR: The publication of Hon. J. L. Orr's speech in reference to certain Florida claims induces me to request that you will also publish the replies of Mr. Stanton, of Tennessee, and myself, as well as the accompanying correspondence, which I deem important in explanation of a point in the discussion not anticipated. This favor will be but an act of justice to my constituents, and I trust you will oblige, very respectfully, your obedient servant,

A. E. MAXWELL.

HOUSE OF REPRESENTATIVES,  
Washington, February 17, 1855.

SIR: It having been stated on the floor of the House of Representatives, in reference to the East Florida claims under the treaty of 19, that "those who alleged they had suffered, and chose to present their claims, presented them, and they were audited, and nothing was done or done to protect the government from the most enormous frauds being perpetrated," will you be so kind as to answer, at your earliest convenience, the following questions, with a view to rebutting this charge, or, if true, confirming it?

[See interrogatories in the answers of Mr. Young.]

An early answer will greatly oblige, your obedient servant,

A. E. MAXWELL.

McCLINTOCK YOUNG, Esq.

WASHINGTON, February 21, 1855.

SIR: In compliance with your request, I have the honor to transmit you answers to the interrogatories propounded to me by you, in relation to East Florida claims for losses of the inhabitants in 1812 and 1813.

Yours respectfully,

McC. YOUNG.

Hon. A. E. MAXWELL,

*House of Representatives.*

*Answers of McClintock Young to certain interrogatories propounded to him by Hon. A. E. Maxwell.*

1st inquiry. Have you any interest, direct or indirect, present or prospective, in these Florida claims?

Answer. I have not.

2d inquiry. Were you not connected with the Treasury Department whilst the East Florida claims, under the act of 1834, were acted on? and if so, what position did you hold?

Answer. I was chief clerk of the Treasury Department when the East Florida claims, under the act of 1834 were acted on by Secretaries Woodbury, Ewing, Forward, Spencer, Bibb, Walker, and during a part of Mr. Meredith's administration of the department.

3d inquiry. What was the course adopted by the department in examining and revising these claims, to guard against improper payments?

Answer. The course adopted by the several Secretaries above named, acting on these claims, was invariably to refer the reports of the Agents of the eastern district of Florida to some one or more of the subordinate officers of the department, to report their opinions on the testimony in each case, and then decide on the award made by the judge.

4th interrogatory. Was not the scrutiny of the department just as thorough in regard to them as it was in regard to claims without previous adjudication?

Answer. Fully as much as if the testimony had been submitted directly to the department.

5th interrogatory. What was the usual price per pound allowed for cotton ; and on what evidence was that price sanctioned by the department ?\*

Answer. To the best of my recollection, fifty cents per pound was generally allowed for Sea Island cotton. In some cases, I think, as high as seventy-five cents were allowed. The evidence on which the judge made his awards was invariably laid before the department, and after the most careful examination of that evidence the award was acted on by the Secretary.

6th interrogatory. What price was allowed for sweet potatoes ; and do you recollect any instance where "from \$2 to \$5 per bushel" was allowed for them ?

Answer. Fifty cents were generally allowed. I remember no case where from \$2 to \$5 were paid ; but, to answer fully this interrogatory, I would have to examine every case acted on. I have only to say that no award was made by the judge in any case which did not accompany with the evidence before him in the matter. With regard to the prices paid for sweet potatoes, I must say that, if different amounts were allowed to different claimants, it must have been on the testimony taken and reported by the judge in the respective cases. The claims for potatoes were of no great amount.

7th interrogatory. What was the rule adopted by the department in making allowance for crops prevented from being made in 1813 ; was it not done by the advice of the Attorney General ?

Answer. To the best of my recollection, an allowance for the crops of 1813 was founded on that of 1812—two-thirds of this were generally, if not always, allowed for the estimated crops of 1813. As to any opinion of the Attorney General on this subject, I have no recollection, excepting one by Mr. Legaré sanctioning the principle. †

\* To show the high prices of cotton in 1812 and 1813, during the war with England, the following references are made to Niles' Register :

In the number dated December 25, 1813, the price of *short staple* cotton is stated as follows :

"Cotton sold in Baltimore last week for forty cents per pound by the quantity. It has been sold at that price in Philadelphia."

Vol. 6, page 184, No. for May 14, 1814, is the following statement :

"Sea Island cotton at Liverpool, March 4, one dollar. Upland, three shillings and six pence sterling."

Vol. 10, page 205. The prices of *Sea Island* cotton are stated at from two to four shillings sterling per pound, being from forty-five to ninety cents per pound.

The Charleston (S. C.) Courier of February 9, 1855, quotes the price of *Sea Island* cotton as follows :

"Fine, from thirty-two to forty cents ; and fine and very fine, from forty-five to fifty-five cents and upwards, as in quality."

† The following is an extract from the opinion of Attorney General Legaré, of 25th October, 1841, in the case of Bunch's executor, referred to by Mr. Young :

"There can be no difficulty about a crop actually made, and ready to be gathered ; there is, in principle, none as to the liability of any one by whose trespass or default it is proved that the making of a crop has been prevented. It is clear he must make reparation as far as the extent of the injury can be ascertained."

"That he should be exonerated from the responsibility by reason of any uncertainty as to the measure of the wrong he has inflicted were to allow him to take advantage of his own delinquency. If it be uncertain what the crop would have been, who is to blame for that uncertainty but the invader that prevented its actually being made?"

8th interrogatory. Did the department in any instance allow more than what was conceded to be, after the closest scrutiny, the fair original value of the property destroyed?

Answer. I cannot recollect an instance in which the Secretary, acting on an award by the judge, allowed more than the amount awarded him. When I was in the Treasury, I believe every Secretary examined fully every case before he directed the payment. The Secretaries always allowed the fair original value of the property proved to have been destroyed.

9th interrogatory. Was it not the practice of the department to remit these cases to the judge for further testimony, whenever any doubt arose as to the price or quantity of the property, before sanctioning the award of the judge; and do not the records show that the witnesses were all cross-examined, personally or by interrogatory, by the judge, and the commissioners to take depositions selected and instructed by him, and was not the department in constant correspondence with the judges whilst adjudicating these claims?

Answer. The department often referred back cases to the judge for further examination and testimony, when doubts were presented or suggested on any points. The copies of the records returned by the judge show invariably that, in all cases necessary, cross-examinations were made by him or under his direction. Frequent correspondence occurred between the department and the judge on the subject of these claims.

10th interrogatory. Are you aware that any Secretary ever entertained a doubt as to the caution or integrity of the judge in protecting the interests of the United States?

Answer. None of the Secretaries before mentioned, at any time, ever pressed to me a doubt as to the caution or integrity of the judge in protecting the interests of the United States. The Secretaries I refer to are Secretaries Woodbury, Ewing, Forward, Spencer, Bibb, Walker, and Meredith, against either of whom no one but the most besotted political partisan can utter a word affecting their honor or integrity in the discharge of their duties as Secretaries of the Treasury.

11th interrogatory. Do not the records show that most of these claims arose from the most wanton and useless destruction of property?

Answer. The testimony in the cases acted on by the judge does certainly show most wanton and useless destruction of property. I feel sorry in saying so, but truth compels me to answer the interrogatory.

12th interrogatory. Were not a large part of these claims acted on while you were in the department?

Answer. A great number, if not a large majority, of these claims were acted on and decided by the department during the period whilst I was the chief clerk.

13th interrogatory. In deciding these claims was any reference had to the treaty or laws of nations by the department, or were they governed exclusively by the usages in regard to domestic accounts?

Answer. In deciding these claims, so far as I can recollect, the department was governed exclusively by the usages in relation to domestic claims. I have no recollection that we ever looked beyond the

acts of Congress before referred to and the usages of the department. Indeed, I feel certain that the laws of nations, and the treaty stipulations founded thereon, were not thought of, simply because we considered we were acting under acts of Congress, and were bound to decide, as in all other cases, where interest was not specially allowed.

14th interrogatory. Were the original records, or certified copies of the petitions, evidence, and decrees sent to the department?

Answer. Certified copies were only sent to the department by the judge.

15th interrogatory. Did not all the Secretaries consider that the judges acted under their commissions as judges, and were their decisions rejecting claims made final?

Answer. I cannot respond to this interrogatory otherwise than by saying that the Secretaries did often revise the awards of the judge, and reconsider decisions on such awards, on arguments or additional testimony submitted, in all cases through him, (the judge.)

I have no recollection that in any case was any amount allowed by the department greater than that awarded by the judge as the value of the property destroyed. When the judge rejected a claim such rejection was never reported to the department; it was final, there being no power to appeal.

McCLINTOCK YOUNG.

FEBRUARY 21, 1855.

IN THE COURT OF CLAIMS.—No. 44.

## ON THE PETITION OF LETITIA HUMPHREYS.

*Brief of the United States Solicitor.*

This is one of a numerous and important class of claims known as the Florida claims, on which the sum of \$1,200,000 has already been paid, and the sum of \$1,700,000, or thereabouts, is still demanded from the United States for interest.

They have been before Congress, in one form or another, for upwards of thirty years, and were again and again rejected when they were urgently pressed by the claimants and their agents, although they were then represented not to exceed in amount the sum of \$40,000. But finally, on that representation, and after many years of impotency, a bill was reported and passed for their relief. From this small beginning, and by these insidious means, a claim, which at first all departments of the government, composed of those who were contemporaries of the transaction and fully conversant with the facts, concurred in rejecting when it was only \$40,000, has already despoiled the treasury of more than a million, and now demands almost two millions more! The remarks of Mr. Butler, made in the Senate on the 2d of March last, to be found on page 1111 of the Congressional Globe, contain a concise and clear statement of the history of these claims, and a complete exposition and refutation of the legal grounds on which they are now presented. I shall read these remarks to the court as a statement of the case and part of my argument. They are as follows:

"In 1811, and 1812, and 1813, before and during the war between the United States and Great Britain, an insurrection occurred in East Florida, and the parties attempted to establish a government independent of the Spanish authorities. A large number of armed men joined the so-called patriots, some from the State of Georgia, and some from other parts, but they mostly went into Florida through St. Mary's, Georgia. They did not succeed in establishing their new government, or the Spaniards called in the Seminoles to aid in repelling them. The Indians, it seems, when the war was raging, did not discriminate much between their Spanish allies, or the revolutionists, and volunteers from Georgia. The first disturbance, or the 'patriot war' of 1811-'12, was succeeded by an invasion of East Florida by an armed militia force, under the command of Colonel Newnan, of Georgia, and Colonel Williams, of Tennessee. It has been said that these proceedings, in both instances, had the countenance of the federal government, and were under the secret acts and resolution of Congress, of 1811. But this was expressly denied by Mr. Madison, then President, and Mr. Monroe, Secretary of State. Regular troops of the United States were on the borders of Florida, and interfered to preserve our rights. The patriots were defeated, and those that remained in Florida were pardoned by the King of Spain. The claims now

urged are by the residents of East Florida, in 1811,—'12,—'13, and are not only preferred by those who were loyal Spanish subjects, but even by some of the patriot insurrectionists, for spoliations by the Seminoles, and the patriots and Georgia volunteers. They are for houses burned; crops of corn and cotton destroyed; horses, hogs, and cattle taken, and slaves killed or stolen; and all kinds of injuries.

"The second invasion was in 1814. General Jackson, whilst in the service of the United States, finding the Spaniards of West Florida, then a Spanish province, were incapable of fulfilling the duties and obligations of neutrality, and that they harbored and permitted British incendiaries, and white and black renegades from the United States, to take advantage of that weakness, and instigate the savages on the frontiers to war—and they did commit the massacre at Fort Mimms under such instigation—with the United States troops under his command, and militia regularly called into service, chastised the Indians in several battles, and finally drove them into West Florida, pursued them, and took possession of Pensacola, and followed the Indians in hot pursuit across several rivers, till they fled into East Florida. He acted under the authority of the United States, and under the law of nations. This was during the war with the British, and nobody ever disputed his right to pursue the Indians as he did.

"In 1817—'18, when we had no war on hand, except that with the southern Indians, whilst in the service of the United States, with the regular troops and militia under his command, after the massacres on the frontiers, General Jackson attacked the hostile Creeks and Seminoles on this side the boundary, whipped them in several battles, and followed them in hot pursuit into West Florida; again took possession of Pensacola, the Barancas, and St. Mark's, and drove the Indians a second time beyond the Suwanee. He executed two British subjects (Arbuthnot and Ambrister) and several Indians at St. Mark's, in April, 1818, and John Quincy Adams sustained him. He defended him on the ground that the Spanish authorities in Florida, and British incendiaries there, aided, abetted, instigated, and harbored the savages; and that the laws of nations justified him.

"We acquired the two Floridas by treaty, in 1819, after these three different invasions, or, if you choose, *aggressions* upon the Spanish territory. The treaty of 1819, ratified in 1821, is express, that as to all the *recent* or the late operations of the American army in Florida, the United States expressly stipulated that they would cause satisfaction to be made for the injuries, if any, which, by process of law, should be established to have been suffered by the Spanish officers and individual Spanish inhabitants. Mr. Crawford was then Secretary of the Treasury. These were the depredations of 1814,—'18, upon what was called West Florida. Those which had been committed, as was alleged, in 1811, and 1812, and 1813, were in what is called *East* Florida. The last were those alluded to in the treaty as 'recent' or 'late operations' of the American army.

"Mr. MALLORY. Will my honorable friend allow me to correct him? He will recollect that in the Spanish version of the treaty the word 'recent,' or the word 'late,' does not occur.

“Mr. BUTLER. Colonel White, former delegate from Florida, started that idea. In the renunciation of the claims to indemnity, the words ‘recent events,’ or ‘transactions,’ are in both versions; and the treaty refers only to the federal army and commanders. The fact is, that from the beginning to the end, there was an effort to bring these East Florida claims of 1811, 1812, and 1813, within the purview of the treaty. They never were within it, and nobody formerly thought them within it, except those who were interested in the claims. Two clauses of the ninth article of the treaty of 1819 provided that the United States should indemnify those persons who had suffered wrong or injury by the late or recent operations, events, or transactions of the American army, or commanders and officers of the United States—federal troops in the Floridas, and nothing else. These claims, in 1823, were by law referred to the judges of Florida, and commissioners, simply to ascertain what were those injuries, and to report them to the Secretary of the Treasury, with an express stipulation that his judgment should be the controlling and the final judgment upon the subject.

“I am not mistaken on that point, because Chief Justice Taney—and I have his opinion before me—or rather the Supreme Court of the United States has so decided after argument by counsel, on a case brought into that court in an effort to get a judicial decree or a judicial decision in some form for those interest claims, which was denied by the court. When the commissioners first sat, in 1823 and 1824, the judges of the different districts in Florida, each being a commissioner for his district, some few of the claimants for the alleged spoliation of 1811, 1812, 1813, and of 1814, presented their claims to the judges. None of the judges (Breckenridge, I think,) would not decide that any of the claims of 1818 were within the treaty, but left that question to the decision of the Treasury Department, taking the testimony, and making a ‘provisional’ award, in case the department should decide the claims anterior to 1818 were included. The East Florida judge, Mr. Smith, held that the claims of 1811, 1812, and 1813, presented to him, were within the treaty, and sent to the department some cases for allowance. Mr. Crawford was then Secretary of the Treasury, and he was also a member of the cabinet when the treaty with Spain was included in 1819.

“On the claims for spoliation prior to 1818 being presented to him, he said they are not embraced by the treaty, and so endorsed on the papers of each claim. There might have been some reason for considering the claims founded on General Jackson’s invasion of West Florida, in 1814, with an army of the United States under his command, and as a federal commander in hot pursuit of the hostile savages, and to dislodge and disperse the British incendiaries harbored by the Spanish authorities at Pensacola and St. Marks, who were inciting the Indians to murder our southern frontier population, as being within the treaty; but he decided that the treaty never intended to reach back even to those cases. As to the East Florida claims, arising out of what was called the *patriot war* of 1811, 1812, and 1813, he refused to allow any of them on the express ground that the treaty was not intended to include, and did not embrace them;



and he refused to pay the claimants a single cent. But they were not satisfied. They brought their claims before Mr. Richard Rush, who succeeded Mr. Crawford as Secretary of the Treasury. Mr. Rush gave them the same answer as his predecessor. He told them: Gentlemen, the treaty does not go back to and include the injuries and wrongs you allege were incurred at a period prior to or during the war between the United States and Great Britain.

"Some of the East Florida claimants of 1826 then petitioned Congress, and contended their claims were within the treaty. John Quincy Adams, who negotiated the treaty, and who, it is presumed, knew what claims were intended to be included, was a member of Mr. Monroe's cabinet when Mr. Crawford decided these claims were not embraced, and was President when Mr. Rush decided the same way, they were the arbiters, according to the terms of the law of 1823. Congress, or, more properly speaking, the House of Representatives, again and again decided these claims were not embraced within the treaty, by approving of reports of its committees at different sessions rejecting the claims on that express ground. I have not the documents at hand, nor time to go over them if I had, but I distinctly recollect that Mr. Forsyth, in 1826,\* Mr. C. A. Wickliffe, in 1827,† and Mr. Archer, in 1830,‡ 1832,§ and 1834,§ all made reports maintaining the doctrine that those claims were not strictly embraced by the treaty, and confirming the decision of Secretaries Crawford and Rush.

"But these claimants pertinaciously persevered. They would not be denied. They would not be content with the repeated decisions of the Executive and of the legislature. They could not be choked off. After some eleven years' importunity, at last, in 1834, they procured an act to be passed. Now, sir, what was then represented to Congress? Congress was told that the whole amount of claims did not amount to more than \$41,000. The amount of the East Florida claims for all the invasions which had, prior to 1834, been presented, it is true, according to the papers sent by the judge to the Treasury, amounted to about that sum. Nobody had any idea that the claims would be swelled up to millions. Congress was deceived. It did not pass the act of 1834 because it supposed these claims were embraced by the treaty. The reports of the committee that reported the bill show this. The prior reports and the action of Congress upon them show it. The act of 1834 does not decide that these claims were in the treaty. It only refers to the act of 1823 as furnishing the *modus operandi* as to proofs and the rule of decision, and it provides expressly that none but Spanish subjects should be allowed, and no losses except those of the two years, 1812 and 1813, or for depredations prior to the entrance into East Florida of the federal agent or federal troops. The decisions of Secretaries Crawford and Rush are referred to, and the cases allowed to be examined by the judge of East Florida, notwithstanding such

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\* See Report House of Representatives, 1st Sess. 19th Cong., No. 12.

† See Report House of Representatives, 1st Sess. 20th Cong., No. 16.

‡ See Report House of Representatives, 1st Sess. 21st Cong., No. 176.

§ See Report House of Representatives, 1st Sess. 22d Cong., No. 293.

§ See Report House of Representatives, 1st Sess. 23d Cong., No. 306.

isions ; but it is a mistake to say the act of 1834 overruled their decision. The reports of the committee show this.

‘The three first are express and unequivocal that the treaty has nothing to do with the claims. Mr. Everett’s report of 1829 suggests that they may be brought within the treaty by extending its terms very liberally. He thought, as we had acquired Florida, and Spain was no longer an adversary, and as the people had become our own citizens, and members of our own family, we might afford to treat them kindly and generously, and pay them the \$41,000 ; and as that was the only claim they preferred, even this was refused by Congress. Mr. Archer’s reports contain the same suggestions, but take even a more liberal view than Mr. Everett’s ; for while they deny the obligation for indemnity under the treaty, they propose to allow them without reference to the treaty. Mr. Archer expressly said that he concurred in the Treasury decisions. So all the reports made by him intend. Mr. White, the Florida delegate, insisted, with great vehemence and earnestness, that the claims were within the treaty, his chief ground being alleged error in translation ; but he was overruled.

“I do not care who are concerned in it ; the claim that they were within the treaty was an impudent pretension. They were not within the treaty. The act was a gratuity, an indulgence, a kindness, a liberal nation—nothing more. Congress said : We will recognize it not at all as coming under the obligation of the treaty, for the committee said it did not. Inasmuch as it was cheapest to quiet the claim, as it was only \$41,000, the committee concluded to report a bill, and allow the matter to be referred to the courts in Florida as commissioners to take testimony to ascertain by process of law, and certify what amount of injury was really sustained.

“Now, Mr. President, what do you think is the fact in relation to this matter ? Since they have brought it up I will state it. Forty-one thousand dollars was the utmost that was alleged originally to have been due before the liberal act of 1834 was passed ; and yet, so soon as the act of 1834 passed, swarms of claimants presented claims, and upwards of \$2,700,000 was claimed. Upwards of \$1,100,000 has been paid. Some of the patriot revolutionists or insurrectionists have referred their claims, and have been allowed thousands of dollars ! The United States is asked to pay all the losses on both and all sides, as well when the Spaniards and patriots were fighting and plundering each other, or when the Seminole Indians plundered either. This is not fact, sir, proved by the record. There have been several reports in the Senate and the House in favor of paying the claims of 1814. They had little to do with these claims. There is more plausibility for saying the claims of 1814 were embraced by the treaty than there is for saying these claims are. The operations of 1814 were by authority of the United States, and by federal troops, and we may have been bound by the law of nations to pay some damages, but we were not bound to pay for the acts of the patriots, filibusters, Indians, and Spaniards of Florida in 1811, 1812, and 1813. Some of those reports pretend that the claims of 1814 should be held to be within the treaty because they were later, and because Congress has held that those of 1812 were within it. This is a *petitio principii*. Congress has never

so held, and Congress has refused steadily to sanction those reports; so that they make nothing out of them.

"I am very sorry that they have brought up this subject. I do not intend to make an apology for speaking upon it. If it was supposed that it would go through the Senate without hearing my opinion upon it, or the opinion of the Judiciary Committee, they were mistaken. I have never known a claim with less justice, or one which, in my opinion, has less in it to commend it to us. There are agents, I suppose—persons interested in it—who urge it with a great deal of pertinacity. I know that many believe, because about \$1,200,000 have been stated by the judges, who acted as commissioners, to be due, that interest ought to be given upon that sum. But, sir, I say the only parties who really had a right to avail themselves of the treaty of 1819 were those who suffered damages, if you choose to say so, by the operations of 1818. They have never claimed interest. Those who had no right, under the treaty, to claim at all have waited until they have got some foothold, as they think, by the liberality of the federal legislation, and make this claim for interest. They have got what they call a verdict—I am told that is the term they use—and they claim interest upon it. They had no right to the principal, except through the liberality of the legislature, and, after they have secured that, they have claimed more than those who were entitled under the treaty of 1819.

"My colleague upon the committee [Mr. PETTIT] has said something about the term 'due process of law' used in the treaty. I have stated, Mr. President, that I have Chief Justice Taney's opinion before me. He says, in regard to this due process of law, in so many words, that the judges to whom the acts of 1823 and 1834 referred these claims, were but 'commissioners,' whose decisions were under the control and supervision of the Secretary of the Treasury; and, sir, those who preferred their claims, and asked to have them allowed under the act, cannot gainsay the provisions of the act under which they ask relief, and have no right to require any other 'process of law' than that which was contemplated, and prescribed, and acted upon, under that very act. The process of law which gentlemen talk about, being prescribed under the very act by which these claimants prefer their demand, it stands as an estoppel to them. It was an act which was extended to them as a matter of liberality, and if gentlemen choose to read Chief Justice Taney's opinion, they will find that the very act under which these gentlemen claim prescribed the tribunal and the process of law by which their claims were to be decided. Yet, sir, after that tribunal has decided, they have an *apex juris*, a law that turns upon a point—upon a pivot. I am impatient when I hear it asserted that these claims are embraced by the treaty; and that, if they are, the acts of 1823 and 1834 do not afford a 'judicial process,' and next, that these parties can claim interest, as upon a judgment or verdict. I know I have not time to go into this matter fully; but I trust they have gained nothing by their motion, in bringing this before the Senate at this time of night. Let the claim go to the Court of Claims, if they have jurisdiction of it; but what court would decide in their favor, with Crawford and Rush, and Chief Justice Taney's adverse decisions? Secretary Guthrie and

Attorney General Cushing are also both adverse to this claim, as their report of last session shows. I do not include that of the majority of the Committee on the Judiciary, for I will not say that it is much authority.

“Mr. TOOMBS. Is there any other question involved in this amendment than that of whether the interest allowed by the courts ought to be paid? Is not that the only question that is presented to us? Is there any other?”

“Mr. BUTLER. I do not know that there is any other. The amendment seems to include all the amount of principal allowed by the judges and disallowed by the different Secretaries of the Treasury since 1823; and there is about as much right to allow the deductions of principal as there is for allowing the interest for forty years past. The Secretary of the Treasury reported at the last session that the interest, up to last July, claimed, was upward of \$1,500,000. There has been already paid \$1,100,000 principal. If the interest was the only question it would be a pretty important one.

“But I have never heard of interest being allowed in cases of this kind, even if the claims were embraced by the treaty, much less if they were mere gratuities. I cannot do myself justice in going further into this matter; but since lawyers have set their judgments up in favor of this allowance I intend to go into it. I shall stand, perhaps, condemned if I do not. I assert the true principles of the case to be, that the claims are not within the treaty—that the act of 1834 was a gratuity—that interest cannot be claimed on losses of this kind—that lonees, like these claimants, have no right, in law or equity, to interest; and that the Florida judges heard and awarded these cases as *commissioners*, and not as a *court*. It has been said, under the authority of Todd, that the judges of Florida could not be invested with judicial powers as commissioners. In that case Todd undertook to claim from the judges, as commissioners, their decision allowing a pension under an act of Congress, and the Supreme Court said to him, you have no right to our action, because the ‘court’ have not been appointed as ‘commissioners.’

“The Florida judge seems to think that he could not act as commissioner. If the position is taken that he could not act as ‘commissioner,’ how and in what capacity did he act? Was his proceeding to make awards an usurpation? Let them take the ground that he did not act as commissioner and I will put them at defiance at once, and say his awards were no decisions at all. By the acts of 1823 and 1824 the judges’ awards were subjected to the revision of the Secretary of the Treasury. It must follow one way or the other. If they were commissioners they did not act as judges, and if they acted as judges they did not act as commissioners. The Supreme Court said they were commissioners, and not judges, not a court. I have their authority for that, and that their awards are not judicial decisions or decrees, subject to appeal.

“I have detained the Senate much longer than I expected, but I never felt more clearly convinced upon any one subject than upon this. I believe this claim is less founded in justice than any other which I have examined. I went into its examination upon the supposition that

it had in it some justice. I have had a great deal said to me upon the subject. I have been beleaguered and invested so closely that I had to lock myself up in my committee room. [Laughter.] But I think they have made a mistake, a great mistake, in having this matter urged for discussion here to-night.

"How much do they want us to pay? The claims, including those of 1818, presented to the judges up to this time, amount to about \$2,700,000. The judges *allowed* about \$1,199,000, and interest at five per cent. on each from the 10th of May, 1813, amounting to about \$1,280,000 more; in all, \$2,479,000. The Treasury Department allowed and paid about \$1,106,000, deducting about \$90,000, part of the principal, and all of the interest awarded by the commissioners, being, together, \$1,370,000. The amendment proposes to pay the 'full amount of the damages decreed by the territorial judges, not heretofore paid.' The amendment refers only to the cases in east Florida, of 1811, 1812, and 1813. It does not include the west Florida claims of 1814 and 1818, amounting to some \$85,000 more, of which about \$25,000 was allowed and paid, and \$12,000 deducted, and \$48,000 disallowed as not being within the treaty; and this does not include any interest. These will come by and by.

"It is said that no specific appropriation is necessary in this amendment, as the acts of 1823 and 1834 contain a continuing appropriation, out of which the balance claimed, principal and interest, can be paid if allowed. If so, the claim has no business in this appropriation bill. It seems the amendment is broad enough to cover the whole amount awarded by the Florida judges, including the deductions made from the awards at the Treasury. This amendment, if it passes, will, I presume, cover about \$1,370,000, being the amount awarded by the commissioners, principal and interest, after deducting the \$1,106,000 paid. Then there is interest up to this time amounting to \$250,000 more—not 'more or less,' but more. These claimants, I verily believe, never had a shadow of right, under the law of nations or any other law, or upon any principle of justice, to demand of the United States one cent of what they call the principal, much less any interest. What Congress has allowed them has been a gratuity, a gift, a donation, and nothing more. And they complain and ask for interest because it was not given to them sooner, and because the gift was not more liberal. Of all the persons in the United States preferring claims to Congress I believe these claimants have the least right. They have already got about \$1,000,000 out of the treasury, under the act of 1834, though it was represented, to get that act passed, the whole amount did not exceed \$41,000. Yes, sir! they have got this \$1,000,000, and they have so run it through these technical funnels that I do not know what, in the progress of the business, they may make out of it. [Laughter.] The claim for interest upon the value of the property destroyed, or taken, or injured, is first founded on the word 'losses' in the treaty, and hence the judges allowed it in their award. The award of the judge is called a verdict or judgment, and then it is said the interest is due upon the claim awarded as upon a 'liquidated demand.' A doctor, it is said, once congratulated himself when he was told his medicine had thrown his patient into fits, and

claimed, 'I'—but I will not repeat the story. Sir, I do not think these claims have been, as yet, brought within the treaty; nor that, if they were within it, there is anything in the treaty, or in the acts of 23 or 1834, that makes the judges' awards, either of principal or interest, final and conclusive; so that the revision by the Secretary of the Treasury, disallowing and deducting the principal when exorbitant, and the interest in all cases, is to pass for nothing; and that the claimants are entitled to have those disallowances and deductions, and all back interest paid to them. Such claim is preposterous. It is extravagant, sir, positively extravagant, and without reason, right, or justice. I regard it as one of those claims which is asserted with the idea that there is a congressional judgment different from that which would be pronounced by any other tribunal. Sir, I do not hesitate to say that there are many claims urged here which could not be urged anywhere else. I make no imputation, because there are differences of opinion among us; but there is a congressional chord which will give a response to anything styled a verdict that you could not find in any tribunal upon earth, governed by fixed rules of justice and right. I am sorry that I have taken up so much time, but I am positive upon this subject. If senators, however, mean to sustain this claim, be it so."

1. Whether the interest claimed in these cases is due, is made to depend, in the argument of the claimant's counsel, on the language of the treaty of 1819; and the argument fails if these claims are not embraced within the treaty. This is the position taken by Mr. Butler, and he maintains it by considerations which are unanswerable, in my judgment.

2. If the court should think otherwise, however, it remains to be considered whether the party has established his claim according to the laws passed to carry out the treaty. Mr. Butler treats of this also, and shows that these claims have not been established under those laws. I will present a few additional remarks on this last head.

3. I will add a summary of authorities on the subject of interest, to show, moreover, that nothing short of express words in a law directing the allowance of interest will authorize the officers of the government to pay it, no matter what may be the origin and nature of the claim, or the mode adopted to establish it.

The ground taken in the petition now under consideration, with respect to the effect of the decision of the judge of the district court in Florida, is the same as that presented in the Senate and discussed by Mr. Butler. The petitioner "represents to the honorable court," (see page 5 of the petition,) "that the estate of her intestate hath obtained, by process of law, a just and valid judgment, establishing the amount of the injury occasioned, by the operations of the American army in East Florida, to said estate, in the years 1812 and 1813, which, by the treaty and acts of Congress before stated, the Secretary of the Treasury was required to pay, and which the government is still bound to pay." I insist that the decision of the Supreme Court in the case of *Ferreira*, 13 Howard, p. 40, referred to in Mr. Butler's argument, settles conclusively the character in which the judge in Florida acted, and decides that the awards rendered by them were

not judgments; that the judges were not acting, in passing on the claims, in their judicial character, but as mere commissioners, whose awards, by the terms of the law under which they acted, imposed no obligations on the United States to pay until approved by the Secretary of the Treasury. The award made by the judges in the case now before the court was not approved by the Secretary of the Treasury. It was, on the contrary, disapproved—disapproved not only in respect to the interest allowed, but disapproved as respects nearly one-half of the principal sum.

When this decision of the Supreme Court was quoted in the House of Representatives by Mr. Orr, (see Congressional Globe, page 734,) for the purpose of which it is here presented, the friends of the claimants replied, that it was an *obiter dictum*, (see Mr. Stanton's speech,) and that may be said here again to impair its authority. It is not an *obiter dictum*. The question of the character in which the judges of Florida acted in passing on these claims was necessarily considered in deciding whether the Supreme Court had jurisdiction of the appeal before them. This is too obvious to be argued. As the case is here presented, the judgment of this court depends altogether upon the question which the Supreme Court have decided; for it is only as a valid judgment rendered by a court duly authorized to hear, and finally determine the amount due to the claimant by the United States, that it is presented to this court. Much indeed is said in the petition, and much may be urged in the argument, against the reasons given by the Secretary for disallowing the claim; but in the case, as here presented, we have nothing to do with such considerations. It is his authority to disapprove and to disallow, that is open to argument in this case. And that is a distinction it is important to the rights of the United States should be kept in the mind of the court. It is not technical merely, but is essential to justice. It will be assumed that these claims have been passed on judicially, under the 9th article of the treaty, and the effort will be made, as it has been heretofore, to turn the whole argument on the point of law whether the government should pay interest when it engages to make satisfaction for injuries to property; and learning has been exhausted to prove, that according to all systems of law—common and civil, national and municipal—that is the proper mode of making satisfaction in such cases. Congress has been warned, in the most friendly and feeling manner, not to fail to make such indemnity in this case, lest when it has occasion to call on other governments hereafter for redress, its own evil example with the Florida claimants will be turned against it. But all this, under the decision of the Supreme Court, is beside the question. We are not now called on to enter into the consideration of what satisfaction consists, on the assumption that we have agreed to make it, but to determine whether, under a particular law, entitled "An act for the relief of certain individuals," they have established a demand against the United States which the accounting officers ought to have paid. In looking into this question, we find that the Secretary of the Treasury, to whom the final decision of these claims was committed, refused to allow a portion of them. He was not bound to give any reason for his decisions, and probably did not give the whole reason. He no doubt saw what we now see, that Congress had been deceived into opening the treasury

these claimants to help themselves out of it *ad libitum*, for such was and always will be the effect of a law which made the amounts to be paid dependent upon mere ex-parte testimony, especially where all in the community were alternately claimants and witnesses. It became a sort of scramble, but one in which the scramblers, so far from interfering with each other as in ordinary scrambles, helped each other the better to help themselves. All were interested in each case, for the prices proved must be the same in all, and every motive of good neighborhood and friendly feeling conspired with direct interest on the part of the witnesses to swell the claims.

The Secretary no doubt understood this. He endeavored in vain to correct it by sending back the awards in many instances, and directing the judge to take further testimony. He then docked off more than half the award in every case by the disallowance of interest, and in many cases, as in this, docked off still more. He probably did not state his true reason for this course, as it was unnecessary, and it was more prudent not to give a reason which would give offence to a community. The effect was precisely the same on the award as if he had said plainly, I disallow one-half these awards in every instance, because, from what I know of the country, it is evident that the extent of the losses is exaggerated in a greater degree in every instance. And he might have had any other reasons for disallowing so much of these claims—or he might have had no reason whatever; it is wholly immaterial, so far as the effects of his acts are concerned, whether he acted with or without reason in the premises. His power I maintain under the authority of the decision of the Supreme Court was unquestionable, and this court will not, under a petition stating as the ground of relief a judgment against the United States, hear an argument to show that if it is not a judgment, it ought to be considered as one by this court, because the officer whose duty it was to hear and determine the case gave an insufficient reason for not giving a judgment for the claimant.

If it is desired to bring to the consideration of this court the claim of these parties on their merits—to open the whole question of whether the law of 1834, which in its title is expressed to be for the relief of certain individuals, and does not purport to be like the act of 1823, and to carry into effect the treaty of 1819, is to be regarded as subsidiary to the treaty, and not a gratuity, and it is desired that this court shall go into an examination of the facts, whether satisfaction for the losses has been made—we must not confine ourselves to the consideration of the acts of the Secretary of the Treasury, or of the judge, or assume that the acts of one set of officers are right and not open to question, and the acts of another set alone open to question. If it is maintained that by the treaty these claimants are entitled to indemnity, and that the machinery established by the laws of 1823 and 1834 has not accomplished that object, and the court is called on to see the contract of the government performed, that end cannot be satisfactorily accomplished, except by discarding all the proceedings heretofore taken, because the court cannot with any greater propriety assume that the proceedings of the judge were correct, than that those of the Secretary of the Treasury were correct. When it is said that the reasons of the Secretary for not allowing interest were insufficient,



and his judgments ought not to stand, although that was made the basis of all claim against the United States by the laws of 1823 and 1834, we reply, that the proceedings before the judge were *ex parte*, which naturally lead to excessive demands, and there would have been under such circumstances no safety whatever for the United States, except in lodging with the executive officer a discretion as to the amount he would pay. That, even with this condition, it was proved to be unguarded, and a most improvident act; but, without it, it would have been such an act of folly as no honest body of grown men would have adopted. That is manifest, as well from this consideration as from the whole history of these claims, that equity is not to be attained by deciding this case on any abstract legal question which may be raised on the reasons assigned for his judgment by the Secretary. Every disinterested and candid man, who considers the facts in this case, will be satisfied, I think, that these claimants have been largely overpaid already. In the first place, there were not over 5,000 white persons, of all ages, in the territory at the date of these transactions, making about six hundred and twenty-five families. Now, three hundred and seventy claims have been presented, three-fifths of the whole number, and more than there were proprietors, probably, in the province; about twelve hundred and twenty-four thousand dollars have been paid, about three thousand five hundred dollars apiece for every proprietor in Florida. The mass of these claims are for crops taken or destroyed, and for negroes, horses, hogs, and cattle, and some for crops not made, and some for houses burned. The amount is incredibly large. It is not credible that this poor Spanish province was so rich at that date. Some of the larger claims are for the destruction of immense crops of cotton, valued at fifty cents per pound. It is hardly credible that property of such enormous value should have been wantonly destroyed by the American army.

I refer to the court also the speech of Mr. Orr, before cited, for a discussion of the prices charged in these bills. In view of these prices, and of the incredible amount of property supposed to be held in this thinly settled Spanish province, and considering that the testimony was taken many years after the losses, amounts could only have been estimates which are ordinarily exaggerated; that it was altogether *ex parte* from neighbors, and by those, in most instances, like themselves, interested in like claims; and above all, that Mr. White, the counsel for the claimants, on the floor of the House, when asked by General McKay what would be the amount of these claims, stated that they would not exceed forty thousand dollars, (see his remarks in Congressional Globe of 23d Congress, quoted by Mr. Orr, Congressional Globe of last session, p. 735;) and I think it impossible to doubt that these claimants have already received indemnity probably ten times over their losses. It is, however, unnecessary for me to raise that presumption in the mind of the court to sustain the point I am endeavoring to enforce, which is, that if the court undertakes to go behind the record to decide upon the equities between the United States and the claimants, it will not answer to stop at the supposed error of the Secretary of the Treasury of disallowing interest, and in

that way disallowing more than half of each award. But we must begin *de novo* here in this court, and go through the whole investigation ourselves, discarding alike all the proceedings heretofore taken in the premises, if we discard any, for it is manifestly inequitable that a party should be permitted to make that portion of a record which favored his case evidence, and discard that portion which was against him. And I have referred to the evidence tending to show that these parties have been overpaid merely to illustrate more strikingly the unfairness of proceeding otherwise. But that is not within the scope of the petition before the court, which proceeds altogether upon the ground that by obtaining the *award* of the judge he has established his demand by "process of law," and that the disallowance of part thereof by the Secretary of the Treasury, although provided for by the very law under which the petitioner claims, was illegal and void. The decision above referred to in 13 Howard is conclusive of the case as presented. I cite also the opinion of Attorney General Cushing, (Ex. Doc. 82,) and the opinions of Attorneys General Crittenden, Legaré, and Nelson, therein referred to, and to be found at p. 333, vol. 5, Opinions Attorneys General, by Hall; Congress 2d do., p. 1392, 1420; Ed. of 1851, p. 1658.

On the subject of the claim of interest against the United States, it is to be observed, that the rules and principles which apply in the present state of municipal law to the relations of individuals have no application to the government. When a debt is ascertained to be due by one man to another, it is the general rule in the courts to allow interest from the date of its maturity, or from the time the money was improperly withheld; and this rule is so commonly applied that it is regarded as a necessary incident to the debt that it should bear interest. But even with respect to individuals this is not true; interest is not a part of the debt. It was unlawful both by the common and civil law prior to the sixteenth century, and is not now sanctioned by express law in England, and *eo nomine* no one is liable to pay interest, except by contract, express or implied. The existence of such an agreement is a question of fact for a jury under the direction of the court, and they are allowed to imply it from various circumstances, especially from usage.—(See 5 Cowen, 609.)

But with respect to the government in its dealing, there is no such usage; on the contrary, its usage is the reverse of that prevailing among individuals on this point, and the one usage is as much the law as the other with respect to the subject of it.—(U. S. *vs.* McDaniel, 7 Peters.)

As respects the fact that such is the usage of the government, see Opinions of Attorneys General, pp. 172, 1159, 1162, 1395, 1663, 1477-'78; 11 Op. 2012; Do. 2031.

These opinions are all in accordance with the language of Mr. Rush, (to be found in State Papers, vol. —, Claims, p. 423,) that special words in an act of Congress were always required to authorize the payment of interest: and the committee say in their report that this construction conforms to the intention of Congress. Nothing can be more conclusively settled than that it requires express language to a law to authorize the payment of it, and by express language interest

*eo nomine* is meant. Thus in the claims of the inhabitants of East Florida, which have been passed upon by several Attorneys General, the language relied on was the stipulation to make satisfaction for the injuries to their property, contained in the treaty with Spain of 1819.

It was argued with great power that satisfaction could not be made without payment of interest, to indemnify these people for the use of the property. But all the Attorneys General concurred in denying the claim, because interest was not provided for in the law—a construction settled by use so long established in the departments, and acquiesced in by the legislature, and declared expressly by committees to be in accordance with the intention of the legislature, as to have the force of law.

But it may be said we are not discussing the rules applicable to executive departments; we wish to find out those applicable to the action of Congress. It will not be controverted, probably, that interest is not payable by the executive departments, except where it is specially directed by law. But this rule for the construction of a law after it is adopted may be said to form no guide for those who have to make the law itself, and the question still remains to be decided in what cases ought Congress to make the special direction required to obtain interest.

The general principle which leads to the construction above stated it will be found, has controlled in legislation. It has been recognized by Congress as well as the executive departments, and adhered to from the beginning of the government, that the government does not pay interest as the *mere incident* of a debt. The cases in which it has been paid stand upon peculiar circumstances; express contract, inability to pay principal, protection of its officers, where interest has been actually paid as offset, &c.

It may be that occasionally an act has been passed paying interest on a liquidated demand duly presented and not questioned; but there are very few of this kind, and I have found none where interest has been allowed for the delay on a demand, arising in consequence of its rejection or being of doubtful validity, either in Congress or by the executive officers.

I have examined all the acts specially allowing interest from 1781 to 1851, inclusive, and subjoin a list and abstract of them for the convenience of the court, and think it will be found useful in these and other cases.

*Cases in which interest has been specially allowed by acts of Congress.*

Laws U. S.

Vol. 6, p. 524. R. H. Harrison; under the resolution of Congress of 1784.

“ p. 537. Riddle, Bechtell, and Headington; on bill of exchange drawn by quartermaster at New Orleans and not paid when duly presented.

“ p. 552. Philip Slaughter; on commutation pay as captain in revolution.

Laws U. S.

- Vol. 6, p. 514. John Laurens; on same, and for diplomatic services, as if funded under act of 4th August, 1790, ch. 34.
- " p. 586. Walton and De Graff; on advances during revolutionary war.
- " p. 560. James Morrison; as set-off.
- " p. 560. Charles Wilks; same.
- " p. 554. Ed. Willet; repayment of interest paid on bill of exchange.
- " p. 574. Jos. Falconer's heirs; on loan office certificate (lost.)
- " p. 622. Jos. Cooper; interest paid by him.
- " p. 621-'2. Marcius W. Gilbert; money advanced during war.
- " p. 863. Springfield Manufacturing Company; according to contract.
- " p. 544. Thomas Triplett; commutation pay and interest as funded debt.
- " p. 848. Converse and Rees; on post office drafts protested.
- Vol. 9, p. 28. Gen. Green; on his bond executed during the war of revolution.
- " p. 11. Christopher Green; under resolution of 1785.
- " p. 11. General St. Clair; on balance due for revolutionary service.
- " p. 20. Agnus McLean; same.
- " p. 32. Gen. Kosciusko; same.
- " p. 48. Fulwar Shepwith; advances during war.
- " p. 50. Moses White; as on certificate of final settlement for services during revolutionary war.
- " p. 51. John Coles; on demurrage under charter party.
- " p. 56. Com. Murray; on account of interest, &c., on capture of Charming Betsey; 2 Cranch, 64.
- " p. 57. Flinn, who was killed in bearing message to Indians; gives widow \$518, and interest.
- " p. 63. Capt. Little; prize money of the Flying Fish.—(See 2 Cranch, 170.)
- " p. 65. Stephen Sayer; on balance due for services during revolutionary war.
- " p. 72. Thomas Barclay; same
- " p. 72. Matthew Smith and Darius Gates; on purchase money of land on failure of title.
- " p. 80. Daniel Cotton; on demurrage under charter party.
- " p. 89. Moses Young; on balance for services during revolutionary war.
- " p. 94. L'Enfant; on compensation for survey of Washington.
- " p. 103. Captain Burnham; on ransom paid at Algiers.
- " p. 110. Anna Young, daughter of Col. Durhee; on his half-pay.
- " p. 116. Jared Shattuck; on judgment recovered of Captain Maley, of United States schooner Experiment.
- " p. 117. Dixon and Murray; on final settlement certificates.
- " p. 134. John Brevard; same.

Laws U. S.

- Vol. 9, p. 141. Dennis Clark; on purchase money of land with title.
- “ p. 146. Rappeleyea; on loan office certificates.
- “ p. 146. Arnold; same.
- “ p. 150. Sands, collector, New York; on judgment recovered against, in execution of his official duty.
- “ p. 159. John M. Forbes; on money advanced.
- “ p. 166. Joseph Wheaton; on award against United States.
- “ p. 167. Alex. Roxburgh; on final certificate.
- “ p. 175. John Holkar; on loan office certificate.
- “ p. 208. John Thompson; on advances in war.
- “ p. 212. John Dabney; on advances.
- “ p. 231. Col. Rees Hill; on advances in war.
- “ p. 238. Neeland; on final certificate.
- “ p. 248. Gen. Wilkinson; on judgment recovered against on account of official action.
- “ p. 247. Samuel Buall; on final certificates.
- “ p. 252. Thomas Leiper; loan office certificates.
- “ p. 269. Reps. of John Guthrey; final certificate.
- “ p. 276. Crute; same.
- “ p. 286. McClung; same.
- “ p. 285. Seward; on purchase of land without title of U.
- “ p. 298. Amasa Stetson; on money advanced.
- “ p. 307. Archibald Clark, collector; on judgment against.
- “ p. 326. Walter S. Chandler; on final settlement certificate.
- “ p. 334. John Crain; same.
- “ p. 338. Heirs of Chretien; on sum illegally collected by warrant from Treasury.
- “ p. 345. Steinman and others; as per contract with Congress, &c.
- “ p. 347. Seward; on purchase money of land sold him, no.
- “ p. 351. Anna Bayler, daughter of Gen. B.; Edwards Easton; on account military service during Revolution.
- “ p. 365. Bar. J. V. Valkenburg; on certificates.
- “ p. 396. William Otis, collector; on settlement of his account.
- “ p. 411. Baltimore city; money advanced.
- “ p. 414. Bank of Chillicothe; on bill of exchange protested.
- “ p. 440. John Scott; loan office certificates.
- “ p. 450. Samuel Ward; final settlement certificate.
- “ p. 455. Whittier, } on amount improperly collected
- “ p. 456. Clever *et al.*, } them as sureties of D. Evans
- “ p. 513. Warner, } collector, &c.
- “ p. 466. Gen. Hazen; under resolution of 1781.
- “ p. 476. Tharp (sutler;) out of money due soldiers on advances to them.
- “ p. 448. Same.
- “ p. 484. A. Edwards; as credit on bond.
- “ p. 516. John J. Jacobs; as if on final certificate.

Laws U. S.

- Vol. 9, p. 537. John Wilson's heirs; seven years' half pay, as if on final certificate under resolution 24th August, 1780.
- " p. 545. Maj. Massius; on judgments recovered against him by Thomas Backhouse and others.
- " p. 551. Wm. Price; commutation pay and interest, as if funded.
- " p. 551. James Barrett; same.
- " p. 538. Richardson (sutler;) interest out of soldiers' pay for advances to them.
- " p. 562. Elbert Anderson; 1. Interest on balance due October, 1814, on money advanced during the war; 2. On warrants not paid; 3. On allowance by comptroller from date of allowance.
- " p. 570. Christian Ish; on certificate as if funded, under act of 1790, chap. 4.
- " p. 571. Michael Gratz; on loan office certificates.
- " p. 711. Jonathan Taylor; same case as James Morrison's.
- " p. 573. Walter Livingston; on award of referees.
- " p. 574. Jacobs & Bayard; loan office certificates.
- " p. 576. Gibbs; same.
- " p. 576. Bird & Pomeroy; same.
- " p. 581. Harnsworth; on purchase money of land without title.
- " p. 587. Gen. Stirling; on final certificate.
- " p. 594. Waddell, marshal U. S.; on judgment recovered against.
- " p. 595. Blaisdell; on judgment recovered by mistake.
- " p. 597. George Reed; on amount of award.
- " p. 621. M. N. Gilbert (sutler;) interest out of soldiers' pay due him.
- " p. 664. David Caldwell; on balance due him as clerk U. S. circuit court in Pennsylvania.
- " p. 672. Delassus; on money taken from him at capture of Baton Rouge.
- " p. 674. Gen. Hurlburt; on certificate under act of 1790, chapter 34.
- " p. 765. Jos. Pierce; on purchase money of land sold him without title by the United States.
- " p. 796-'7. Eskridge, Fish, Brewer; same.
- " p. 802. Matthew Lyon, } on refunding fine imposed under
- " p. 924. Antony Haswell, } alien and sedition laws.
- " p. 931. Charles Holt, }
- " p. 837. James Morrow and Jonathan Tipton; on judgment recovered against them on account of acts done by order of commanding general.
- " p. 900. Spence; allows credit and offset, interest on pay.
- " p. 846. Johnson; on judgment illegally rendered against him.
- Vol. 1, p. 227. Oliver Pollock; on supplies furnished during the revolution.

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- Vol. 1, p. 371. Certain States; balance on settlement, funded under act of 1790, chap. 38.
- Vol. 2, p. 248. On awards in pursuance of the 7th article of the treaty with Great Britain.
- “ p. 389. Representatives of Caron Beaumarchais; on stores, &c., furnished during the revolution.
- Vol. 3, p. 422. Inhabitants of West Florida; on advances to the United States.
- “ p. 560. Same.
- Vol. 4, p. 132. Virginia, }  
 “ p. 161. Maryland, } Repayment of interest paid by them  
 “ p. 175. Delaware, } on loans to carry on war of 1812.  
 “ p. 177. Baltimore city, }  
 “ p. 192. New York, }  
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 “ p. 499. South Carolina differs from above in using fund from which she derived interest; and so lost interest.
- “ p. 440. Philip Doddridge; on the amount of purchase for land in military reserve in Ohio; see case of Reynolds *vs.* McArthur, 2 Peters, 417.
- “ p. 594. Pettigru—McKnight; account not stated.
- “ p. 626. Hall; vessel siezed by United States not condemned, and lost.
- “ p. 715. To reimburse naval pension fund invested in stock of Bank of Columbia.
- Vol. 9, p. 704. Lewis Sartori; on compensation as professor on ship Constitution.
- “ p. 236. To certain States, corporations, and individuals; on advances made to fit out volunteers in Mexican war, June 2 1848.
- “ p. 306. John Caldwell; same account.
- “ p. 306. State of Alabama; same to other troops.
- “ p. 769. Joshua Burney; money advanced.
- “ p. 778. Union Bank, Florida; money loaned governor to protect the country from the Indians.
- “ p. 626. Georgia; advances to suppress Indian hostilities.
- “ p. 626. Maine; advances to protect eastern frontier.

*Classification of the cases in which interest has been specially allowed by act of Congress.*

On examining the list it will be seen that it consists chiefly of cases in which provision is made to refund money and pay for supplies, arms, &c., advanced for the use of the United States, principally during the revolution, but occasionally during the war of 1812 and the Mexican war; and special provision for funding the debt incurred

officers and soldiers for services during the revolution, in cases where final certificates given by the army commissioner were lost, and where no office certificates.

For the payments of interest for advances, &c., during the revolution, were by express contract; see resolutions 1776—1781. The act of June, 1848, was similar in its provisions.

The final certificates for service by the army commissioner and loan certificates were funded by act of 1790, as part of the domestic debt.

The special acts above quoted provide for some which were lost or unpaid. Of the other cases, some are for payment of interest on bonds of exchange drawn by officers duly authorized, and not paid when due; on judgments obtained against officers in favor of individuals, incurred in the discharge of official duties; on credits or offsets due to officers and contractors were entitled, in pursuance of express contracts; in settlement of prize cases on money paid for land sold by the United States without title; on improper judgments, warrants, seizures on awards against the United States by referees.

There are but few cases not reducible to these heads. In a few instances interest was allowed on what are called in the acts "liquidated demands," where there was no dispute about the compensation being due, but payment has been unreasonably deferred, although duly presented; but no case in which it was allowed on a demand rejected by the accounting officers as legal or withheld because of doubtful title.

M. BLAIR, *Sol. U. S.*

## LETITIA HUMPHREYS, ADMINISTRATRIX,

*vs.*

## THE UNITED STATES.

Opinion of the court delivered by BLACKFORD, J.

This is a claim by the administratrix *de bonis non* of Andrew Atkinson, deceased, against the United States. The claim is for interest and certain damages which, it is alleged, the intestate sustained, in 1810 and 1813, by the operations of the American army in Florida.

To understand the nature of the claim, it will be necessary to refer to the treaty of 1819, between the United States and Spain, for the cession of the Floridas, and to certain acts of Congress of 1823 and 1825.

The ninth article of said treaty contains the following clause:

"The United States will cause satisfaction to be made for the interest, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida."

In consequence of that clause in said treaty, Congress, on the 3d of March, 1823, passed the following act:



"*Be it enacted, &c.*, That the judges of the superior courts, established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed to receive and adjust all claims, arising within their respective jurisdictions, of the inhabitants of said Territory, or their representatives, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said Territory was ceded to the United States.

"SEC. 2. *And be it further enacted*, That in all cases in which said judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged, out of any money in the treasury not otherwise appropriated."—(3 Stat. at Large, p. 768.)

On the 26th of June, 1834, Congress passed another act, as follows:

"*Be it enacted, &c.*, That the Secretary of the Treasury be, and he hereby is, authorized and directed to pay, out of any money in the treasury not otherwise appropriated, the amount awarded by the judge of the superior court at St. Augustine, in the Territory of Florida, under the authority of the 161st chapter of the acts of the 17th Congress, approved 3d March, 1823, for losses occasioned in East Florida by the troops in the service of the United States, in the years 1812 and 1813, in all cases where the decision of the said judge shall be deemed, by the Secretary of the Treasury, to be just: *Provided*, That no award be paid except in the case of those who, at the time of suffering the loss, were actual subjects of the Spanish government: *And provided, also*, That no award be paid for depredations committed in East Florida, previous to the entrance into that province of the agent or troops of the United States.

"SEC. 2. *And be it further enacted*, That the judge of the superior court of St. Augustine be, and he hereby is, authorized to receive, examine, and adjudge all cases of claims for losses occasioned by the troops aforesaid in 1812 and 1813, not heretofore presented to the said judge, or in which the evidence was withheld, in consequence of the decision of the Secretary of the Treasury, that such claims were not provided for by the treaty of February 22, 1819, between the governments of the United States and Spain: *Provided*, That such claims be presented to the said judge in the space of one year from the passage of this act: *And provided, also*, That the authority herein given shall be subject to the restrictions created by the provisos to the preceding section."—(6 Stat. at Large, p. 569.)

After the passage of this act of 1834, and within the limited time, the administratrix of said Atkinson, deceased, presented her claim, under said acts of Congress, to the judge of the superior court at St. Augustine. The judge accordingly examined the testimony in the case, and in August, 1839, rendered a decree in favor of the claimant for \$3,800, with interest at the rate of five per cent. per annum from the 10th of May, 1813. The judge soon afterwards certified the proceedings, with the evidence in the case, to the Secretary of the Treasury.

the United States, as the said acts of Congress required. The then secretary, Mr. Woodbury, made the following decision in the case :

"In the within claim of Susan Murphy, administratrix of Andrew Atkinson, deceased, a claim under the ninth article of the treaty with Spain of the 22d of February, 1819, the sum of 2,300 dollars, being so much of the award of the judge of the superior court of East Florida as is deemed just and proper, is *approved*, without interest, in virtue of power vested in me by the act of the 26th of June, 1834, entitled 'An act for the relief of certain inhabitants of East Florida.' The case is therefore referred to the First Auditor for settlement.

"LEVI WOODBURY,

"*Secretary of the Treasury.*

"TREASURY DEPARTMENT,

"November 28, 1839."

That amount of \$2,300 was accordingly paid.

Afterwards, in September, 1852, the then Secretary of the Treasury, Mr. Corwin, made the following further decision in the case:

"TREASURY DEPARTMENT, September 21, 1852.

"In the within case of the estate of Andrew Atkinson, deceased, claimant under the 9th article of the treaty with Spain of the 22d February, 1819, for losses in East Florida in the years 1812-'13, it appearing that an award, amounting to the sum of \$3,800, was made by Judge Reid, at St. Augustine, on the 15th August, 1839, on which a sum of \$2,300 was approved and paid under the decree of this department, dated 28th November, 1839, as per statement filed in the office of the Register, No. 78,295; and it further appearing to the satisfaction of the department, on a careful examination of the case, that the further sum of \$1,500, included in said award, is justly due the said claimant, the said sum of \$1,500 is allowed, without interest, the balance in full of the entire claim, to be paid to the legal representatives of said Andrew Atkinson. Done in virtue of the power vested in me by the act passed the 26th June, 1834, for the relief of certain inhabitants of East Florida. Referred to the First Auditor for settlement.

"THO. CORWIN."

That sum of \$1,500 was accordingly paid.

Therefore, the award of the judge, so far as regards the principal sum, has been approved, and the money paid; but so far as regards the interest, the award has been disallowed.

The administratrix *de bonis non* of said Atkinson now files her petition in this court in order to recover the interest, which the Secretary refused to pay, with damages for its non-payment.

This case, according to our view of it, depends upon two questions: first, whether the decision of the judge in Florida, in favor of the sum for interest, was subject to the review of the Secretary? and if was, then, secondly, whether the judgment of the Secretary against the claim is final and conclusive as regards this court?

The clause in the Florida treaty, before referred to, provides that

satisfaction be made for certain injuries, which should be established by process of law, to have been suffered by the then late operations of the American army in Florida ; but it does not provide a tribunal by which the claims, on account of those injuries, should be decided. The appointment of such a tribunal was left by the treaty to be made by the government of the United States ; and it was in consequence of the treaty, in that respect, that the act of 1823 was passed. There had been injuries committed in 1812 and 1813, and also in 1818, by the American army in Florida ; and the Secretary of the Treasury had decided that the treaty did not apply to the injuries of 1812 and 1813. It was in consequence of that decision that the act of 1834 was passed, which provides for the injuries committed in 1812 and 1813. The acts of 1823 and 1834 must be considered as if their provisions were contained in the same act. The object of both acts is the same, namely, to furnish an appropriate remedy by which the injuries mentioned in the last clause of the ninth article of the treaty aforesaid might be established, and the satisfaction there alluded to be obtained.

It has been correctly said that the tribunal created by the act of 1823, and recognized by the act of 1834, consists of two parts: the judge in Florida constituting one, and the Secretary of the Treasury the other. The judge in Florida was to take the testimony, and determine upon the merits of the claims ; and when he had decided in favor of a claim, he was required to report his proceedings, with the evidence, to the Secretary of the Treasury. And the Secretary, on being satisfied that the decision was just and equitable, within the provisions of the treaty, was to pay the amount.

It appears to us that the tribunal so constituted is in accordance with the requirements of the treaty. The treaty required the injuries to be established by process of law. That phrase, process of law, when used in a treaty, must, says an eminent lawyer, "be interpreted according to the law of nations, and not according to our municipal code." And no authority has been referred to showing that such phrase has any technical meaning by the law of nations. It was for Congress to provide a tribunal before which the claimants might have an opportunity to establish their respective claims. The tribunal in question is such a one. It is, to be sure, not an ordinary court of justice, nor does the treaty require it to be so. It is a tribunal, however, where every claimant can have the merits of his claim fairly adjusted and decided, upon such evidence as he himself may think proper to furnish.

The Florida judges were, by the law, to act as commissioners. That is shown by the acts of 1823 and 1834, from which the judges derive their authority. The act of 1823 says, "that the judges of the superior courts, &c., are hereby authorized," &c. And the act of 1834 authorizes the Secretary to pay "the amount awarded by the judge of the superior court," &c. It says, also, "that the judge of the superior court, &c., is hereby authorized," &c. So that the authority to adjust these claims is not given to the courts in Florida, but to the *judges*, respectively. It is not judicial power, properly speaking, but that of a commissioner only, that is conferred. The

claimant relies on the case of the *United States vs. Todd*, decided by the Supreme Court of the United States in 1794, to show that the judges in Florida could not act as commissioners. But that case does not touch the question. The act of 1792, under which it was held that the judges of the circuit courts could not act as commissioners, did not confer, nor profess to confer, on the judges the power to act in the premises. It was only to the circuit courts that the authority was given. Had the act of 1792, like the acts of 1823 and 1834, given the power to the judges instead of to the courts, there is nothing in the case of the *United States vs. Todd* which shows that the judges could not have acted as commissioners.—(See the case of the *United States vs. Todd*, 13 Howard, 52, note.) We have on this subject a late decision of the Supreme Court of the United States in a case arising under the same clause in the Florida treaty, and the same acts of Congress, with the case now before us. The language of the Chief Justice, in delivering the opinion of the court, is as follows:

"The law of 1823, therefore, and not the stipulations of the treaty, furnishes the rule for the proceeding of the territorial judges, and determines their character. And it is manifest that this power to decide upon the validity of these claims is not conferred on them as a judicial function, to be exercised in the ordinary forms of a court of justice. For there is to be no suit; no parties in the legal acceptance of the term are to be made; no process to issue; and no one is authorized to appear on behalf of the United States, or to summon witnesses in the case. The proceeding is altogether *ex parte*; and all that the judge is required to do is to receive the claim when the party presents it, and to adjust it upon such evidence as he may have before him, or be able himself to obtain. But neither the evidence nor his award, are to be filed in the court in which he presides, nor recorded here; but he is required to transmit both the decision and the evidence upon which he decided to the Secretary of the Treasury; and the claim is to be paid if the Secretary thinks it just and equitable, but not otherwise. It is to be a debt from the United States upon the decision of the Secretary, but not upon that of the judge.

"It is too evident for argument on the subject, that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one. The authority conferred on the respective judges was nothing more than that of a commissioner to adjust certain claims against the United States; and the office of judges, and their respective jurisdictions, are referred to in the law, merely as a designation of the persons to whom the authority is confided, and the territorial limits to which it extends. The decision is not the judgment of a court of justice. It is the award of a commissioner. The act of 1834 calls it an award."—(*The United States vs. Ferreira*, 13 Howard, 46, 47.)

That opinion of the Supreme Court is in point to show, that the judge in those cases acts merely as a commissioner and not as a court. The proceedings of the judge in the case now before us do not purport to be the proceedings of a court. The judge calls his decision an 'award,' and signs it as follows: "Robt. Raymond Reid, Judge and Com'r."

The copy of the proceedings sent by the judge to the Secretary of the Treasury has annexed to it the following certificate :

“TERRITORY OF FLORIDA, *District of East Florida.*

“I hereby certify that the foregoing pages, from one (1) to seventy-four (74) inclusive, contain a true copy of the claim of Mrs. Susan Murphy, the administratrix of Andrew Atkinson, deceased, the evidence taken therein, and the award thereon—the originals of which are now of file in my office. Dated at St. Augustine, 15th August, 1839.

“ROBT. RAYMOND REID,  
“*Judge and Com'r.*”

The act of 1847, relative to this business of the judge, calls him a commissioner.—(9 Stat. at Large, p. 130.) The Supreme Court decides further in the above cited case, that the creation of the judges as commissioners was a compliance with the treaty.

Considering the judge, therefore, with respect to these claims, as a commissioner, and authorized to act as such in the premises, the case seems to be a very plain one. The judge examines and determines the case and reports his proceedings, with the evidence, to the Secretary of the Treasury, and the Secretary, if he find the decision of the judge to be just and equitable, within the provisions of the treaty, pays the claim, but not otherwise.

An objection has been made to considering the judge as a commissioner, on the ground that Congress had no authority to make such an appointment. But if that appointment is void, there is no foundation for the present claim. The law, as has been shown, gives no authority to the court in Florida to act in the premises. The report by the judge of his proceedings shows that he did not act as a court. He acted solely as a commissioner ; and if he was not legally a commissioner, his proceedings are a nullity. And if his proceedings are a nullity, there is not only no ground for the present claim for interest, but the three thousand eight hundred dollars principal, formerly received for the estate of Atkinson from the treasury, can be recovered back by the United States as having been received upon a void report.

The claimant's counsel contend that the act of 1823, in saying that the Secretary of the Treasury, on being satisfied that the decision “is just and equitable within the provisions of the treaty, shall pay the amount thereof,” has a very limited effect. They contend that the act only means that the Secretary shall determine whether the case is within the provisions of the treaty, that is, whether the injury was committed in Florida ; whether the person injured was a Spanish officer, or an individual Spanish inhabitant, &c. ; but that it does not mean that the Secretary shall determine whether or not the decision is just and equitable. We feel very confident that the meaning of the act is not so limited. The language, indeed, of the act is directly to the contrary. If the Secretary's authority is limited, as the counsel contend, why does the act require that all the evidence taken shall be reported to the Secretary, and that he shall be satisfied before he pays the money that the decision of the judge is just and equitable within

the provisions of the treaty? If, as is admitted, the Secretary cannot pay the money awarded until he has ascertained, from the evidence, whether the case is within the provisions of the treaty, how is it possible for him to pay it until he has ascertained, by the same means, that the decision is just and equitable? The same section of the act of 1823—the same sentence, indeed—that requires the Secretary to make the former inquiry, requires him to make the latter also, before he pays the money.

The claims embraced by the acts of 1823 and 1824 were very large. Those that had been reported to the Secretary of the Treasury amounted, in 1854, to two millions eight hundred and eight thousand seven hundred and three dollars and fifteen cents; of which claims, the Secretary had paid one million two hundred and twenty-four thousand nine hundred and ninety-two dollars and sixty-eight cents. The interest on the claims amounted, in 1854, to one million five hundred and fifty thousand four hundred and thirteen dollars.—(See report of Secretary Guthrie, Senate Document No. 82, 33d Congress, 1st session.)

Congress may not have known when the act of 1823 or that of 1834 was passed that these claims would be so large: but it is fair to presume that they did know that the amount was entirely too large to be entrusted to the *final* decision of the two judges in Florida, each acting by himself on the cases before him. It was, therefore, to be expected that a review of their decisions would be provided for. That was accordingly done by making it the duty of the Secretary of the Treasury to revise the respective decisions of those judges, and not to pay any allowances of either of them which he did not find to be just and equitable.

That the provisions of the act of 1823, giving a revisory power to the Secretary as aforesaid, is perfectly consistent with the treaty, is expressly decided by the Supreme Court of the United States. The following is the language of the Chief Justice:

“Nor can we see any ground for objection to the power of revision and control given to the Secretary of the Treasury. When the United States consent to submit the adjustment of claims against them to any tribunal, they have a right to prescribe the conditions on which they will pay. And they had a right, therefore, to make the approval of the award by the Secretary of the Treasury one of the conditions upon which they would agree to be liable. No claim, therefore, is due from the United States until it is sanctioned by him, and his decision against the claimant for the whole or a part of a claim, as allowed by the judge, is final and conclusive. It cannot afterwards be disturbed by an appeal to this or any other court, or in any other way, without the authority of an act of Congress.

“It is said, however, on the part of the claimant, that the treaty requires that the injured parties should have an opportunity of establishing their claims by a process of law; that process of law means a judicial proceeding in a court of justice, and that the right of supervision given to the Secretary, over the decision of the district judge, is, therefore, a violation of the treaty.

“The court think differently; and that the government of this coun-

try is not liable to the reproach of having broken its faith with Spain. The tribunals established are substantially the same with those usually created where one nation agrees by treaty to pay debts or damages which may be found to be due to the citizens of another country. This treaty meant nothing more than the tribunal and mode of proceeding ordinarily established on such occasions, and well known and well understood when treaty obligations of this description are undertaken. But if it were admitted to be otherwise, it is a question between Spain and that department of the government which is charged with our foreign relations; and with which the judicial branch has no concern. Certainly, the tribunal which acts under the law of Congress, and derives all its authority from it, cannot call in question the validity of its provisions, nor claim absolute and final power for its decisions, when the law, by virtue of which the decisions are made, declares that they shall not be final, but subordinate to that of the Secretary of the Treasury, and subject to his reversal."—(*The United States vs. Ferreira*, before cited.)

It would seem that this opinion of the Supreme Court ought to settle the point that the tribunal in question, consisting of the judge as a commissioner, and the Secretary having a revising power, is in accordance with the treaty.

But, after all, we cannot believe that it is important for this court to inquire whether the tribunal is or is not consistent with the treaty. We are bound to consider the tribunal to be properly constituted. The treaty stipulation that the United States would cause satisfaction to be made in certain cases was a contract to be executed by Congress. Chief Justice Marshall, on this subject, says: "Our Constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court."—(*Foster vs. Neilson*, 2 Peters, 314.) Congress has in this case, in the exercise of its exclusive jurisdiction, created a tribunal for the special purpose of determining these cases; and it is not for this or any other court to lessen or otherwise interfere with the powers of that tribunal. There was no tribunal subsequently to the treaty to which the claimant could resort until the act of 1823. There is none now but the one which that act has established. The authority of the judge, as we have before said, depends not upon the treaty, but upon the acts of Congress of 1823 and 1834, and upon those acts alone. The legislative provisions relative to the powers and duties of the judge and the Secretary of the Treasury, in these cases, cannot be separated. What kind of tribunal on the subject should be established, was a political question for Congress to determine. They have determined that the allowance made by the judge shall be subject, both as to his jurisdiction and as to the merits of the claim, to the revision of the Secretary; and no court can say that there shall be no such revision. The decision of the judge can have no effect, under the law,

until the Secretary has decided upon the justice and equity of the claim. If, upon the evidence, the Secretary finds that the decision of the judge is not just and equitable, he is bound to reject it; and so, if he finds a part of the decision to be unjust and inequitable, he must reject that part.

We have now shown, we think, that whether the decision of the Florida judge in favor of the claim for interest was just and equitable, was a question for the determination of the Secretary of the Treasury. In arriving at this conclusion, it is a satisfaction to know that our opinion is based upon a decision of the Supreme Court of the United States. It is always gratifying to a court, in deciding a case, to have in favor of its decision a well considered opinion of another judicial tribunal. It is especially so when that tribunal is, in every respect, the highest in the land. The case of *Ferreira vs. The United States*, above referred to, was fully argued by eminent counsel, and the opinion of the court was delivered by its distinguished Chief Justice. The claimant contends that the reasoning of the court in *Ferreira's* case is not authority. The question whether the court had jurisdiction depended, as the court considered, upon whether the decision of the judge in Florida was or was not the decision of a court; and whether it was subject to the revision of the Secretary of the Treasury. To determine those questions, an examination of the said treaty and acts of Congress was necessary. The court was of opinion that the judge acted as a commissioner and not as a court; and that the revisory power of the Secretary was unobjectionable. It was by virtue of that opinion that the court reached the conclusion that it had no jurisdiction of the case. The reasons given by the Supreme Court, to show that the judge acted merely as a commissioner, and that his decision was subject to the review of the Secretary, are, in our opinion, unanswerable.

The remaining question is, whether the decision of the Secretary of the Treasury, against the claim for interest, is not final and conclusive?

It appears to us to be very clear that the Secretary's decision against the claimant puts an end to the demand. This judgment is sustained by the opinion of the Supreme Court of the United States in *Ferreira's* case, before cited. The decision of the Secretary, as to the law and the facts, must be considered as the decision of a competent tribunal of exclusive jurisdiction. It stands upon the same ground with the decision of a board of commissioners appointed by or under a treaty to determine upon the amount and validity of such claims as the one before us. That the decision of such a board is conclusive, has been settled by the Supreme Court of the United States in the case of *Comegys vs. Vasse*, 1 Peters, 212. The same point is decided by this court in the case of *Thomas vs. The United States*, and *Roberts vs. The United States*.

Considering, as we do, the decision of the Secretary against the claim for interest as final, we have not found it necessary to extend our inquiry on the subject of interest beyond that decision.

It is the opinion of the court, for the foregoing reasons, and upon the authorities cited, that the claimant has shown no ground for relief.



LETITIA HUMPHREYS, ADMINISTRATRIX OF ANDREW  
ATKINSON, DECEASED,

vs.

THE UNITED STATES.



Dissenting opinion delivered by SCARBURGH, J.

If this were an ordinary case, I think it probable that I should submit in silence to the judgment of the majority of the court, even though I should entertain an opinion different from that of my brethren. But, in the view which I have taken of this case, it involves principles of the gravest magnitude and importance. It is said to be one of a class of cases in which the mere money demand extends to hundreds of thousands; but that consideration, though highly important, sinks, in my judgment, into utter insignificance, when compared with the great principles which they present for adjudication. I cannot concur in the opinion of the majority of the court. I feel constrained to dissent from it, and to declare the reasons on which my dissent is founded. I do so under a solemn conviction of duty.

The treaty of 1819, between the United States and his Catholic Majesty, was drawn up in the Spanish as well as in the English language. Both are originals.—(United States *vs.* Perchman, 7 Peters' R., 81.) In the English original the ninth article contains the following provision:

"The United States will cause satisfaction to be made for the injuries, if any, which, by process of law, shall be established to have been suffered by the Spanish officers, and individual Spanish inhabitants, by the late operations of the American army in Florida."—(8 Stat. at Large, p. 252.)

I have obtained two translations of the corresponding provision in the Spanish original: the one, through the solicitor of this court, and the other, through the counsel for the petitioner. They were made by different persons, but substantially—almost in *ipsissimis verbis*—agree. They are appended to this opinion. The following is the translation furnished by the solicitor:

"And the United States shall (or will) satisfy (or make satisfaction) for the injuries, if any there should have been, which the Spanish inhabitants and (Spanish) officers may (or shall) judicially prove, according to law, that they have suffered (literally to have suffered) by the operations of the American army in them (the Floridas)."

On the third day of March, A. D. 1823, Congress passed an act entitled "An act to carry into effect the ninth article of the treaty concluded between the United States and Spain the twenty-second day of February, one thousand eight hundred and nineteen." It is as follows:

"That the judges of the superior courts, established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be,

and they are hereby, authorized and directed to receive and adjust all claims arising within their respective jurisdictions of the inhabitants of said Territory, or their representatives, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said Territory was ceded to the United States.

"Sec. 2. That in all cases in which said judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be by the said judges reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged, out of any money in the treasury not otherwise appropriated."—(3 Statutes at Large, p. 768.)

On the 25th day of June, A. D. 1834, Congress passed another act entitled "An act for the relief of certain inhabitants of East Florida." It is as follows:

"That the Secretary of the Treasury be, and he hereby is, authorized and directed to pay, out of any money in the treasury not otherwise appropriated, the amount awarded by the judge of the superior court at St. Augustine, in the Territory of Florida, under the authority of the one hundred and sixty-first chapter of the acts of the seveneenth Congress, approved third March, one thousand eight hundred and twenty-three, for losses occasioned in East Florida by the troops in the service of the United States, in the years one thousand eight hundred and twelve and one thousand eight hundred and thirteen, in all cases where the decision of the said judge shall be deemed by the Secretary of the Treasury to be just: *Provided*, That no award be paid, except in the case of those who, at the time of suffering the loss, were actual subjects of the Spanish government: *And provided also*, That no award be paid for depredations committed in East Florida previous to the entrance into that province of the agents or troops of the United States.

"Sec. 2. That the judge of the superior court of St. Augustine be, and he hereby is, authorized to receive, examine, and adjudge all claims for losses occasioned by the troops aforesaid, in one thousand eight hundred and twelve and one thousand eight hundred and thirteen, not heretofore presented to the said judge, or in which the evidence was withheld, in consequence of the decision of the Secretary of the Treasury that such claims were not provided for by the treaty of February twenty-second, one thousand eight hundred and nineteen, between the governments of the United States and Spain: *Provided*, That such claims be presented to the said judge in the space of one year from the passage of this act: *And provided also*, That the authority herein given shall be subject to the restrictions created by the provisions to the preceding section."—(6 Stat. at Large, p. 569.)

After the passage of the act of 1834, Susan Murphy, administratrix of Andrew Atkinson, deceased, filed a petition before Robert Raymond Reid, judge of the superior court for the eastern district of Florida. In her petition she alleged, among other things, that in the years 1812 and 1813 her intestate was subjected to certain losses and damages, which she specifically sets forth, by the acts of the troops of

the United States and their confederates, in the then province of East Florida ; that the losses occurred subsequently to the appearance of the troops and agents of the United States in East Florida ; and that her intestate was at that time, and ever continued, a faithful Spanish subject, active and true in the discharge of his duties.

Due proceedings were had upon the petition, and a judgment was awarded by the judge, "that the claimant do recover the sum of three thousand eight hundred dollars for her intestate's losses in 1812 and 1813, with an interest of five *per centum* from the 10th May, 1813." This judgment, with the evidence on which it was founded, was, by the judge, reported to the Secretary of the Treasury. On the 28th day of November, A. D. 1839, the Secretary of the Treasury directed the payment of the sum of \$2,300, part of the amount adjudged in favor of the claimant ; and subsequently he directed the payment of the sum of \$1,500, the residue of the principal sum awarded by the judgment in favor of the claimant. These two sums of money have been paid ; but the Secretary of the Treasury refused to pay the interest, which the claimant recovered by the judgment, and the same remains unpaid. The petitioner now claims the interest.

Prior to the passage of the act of 1834, the Secretary of the Treasury held that injuries suffered in 1812 and 1813 were not within the treaty, and this decision, it seems, occasioned that act.

I. In determining whether the petitioner is entitled to relief, I deem it important to inquire, in the first place, whether her case is embraced by the provisions of the ninth article of the treaty.

The only doubt which has ever been suggested upon this point has arisen from the word "late," which is found in the English, but not in the Spanish, original of the treaty. If it be interpreted in the sense of "latest," or "last," then the English and Spanish parts are wholly irreconcilable. At the date of the treaty Florida was divided into two provinces—East and West Florida. The last operations of the troops of the United States occurred in the year 1818, and were confined to West Florida. The words of the Spanish original cannot, therefore, be satisfied, if they be restricted to the operations in 1818, because, in their natural import, they extend to both the Floridas, and they cannot, without violence, be limited to one of them only. And, moreover, the Spanish original does not contain the word "late." But the word late does not necessarily mean "latest," or "last." It may mean "not long past : happening not long ago ; recent." It is apparent, therefore, that no violence will be done to the word "late" by extending it so as to include the operations of the troops of the United States in East Florida in 1812 and 1813. At the time of making the treaty there would have been no impropriety of language in saying that they occurred not long ago—recently. If this construction be adopted, the English and the Spanish originals harmonize with each other. "Both are originals, and were, unquestionably, intended by the parties to be identical. \* \* \*

If the English and the Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail."—(Per Marshall, C. J., in *United States vs. Perchman*, 7 Peters' R., 88.)

The Supreme Court acted upon this principle in that case. Although, looking alone to the original in the English language, they had held, in the case of *Foster vs. Neilson*, (2 Peters' R., 253,) that the words "shall be ratified and confirmed," in the 8th article of the treaty of 1819, were words of contract, stipulating for some future legislative act; yet the Spanish part of the treaty being brought to their view in the case of *The United States vs. Percheman*, and the words, translated, being "shall remain ratified and confirmed," they overruled their former decision, and held the meaning to be "ratified and confirmed" by force of the instrument itself, without the aid of legislation. The analogy between that case and this is clear. If there be any difference between them on this point, less effort is required in this than in that to produce a conformity between the Spanish and English parts. It may certainly be as truly and as properly said here as there, that "no violence is done to the language of the treaty by a construction which conforms the English and Spanish to each other."—(Ibid., 89.)

This construction of the treaty is fortified by the act of 1834, which overrules the action of the Secretary of the Treasury, by which the losses of 1812 and 1813 had been rejected, and in effect declares that they are within the provisions of the treaty. Such is clearly the proper construction of that act. The first section of it provides for the satisfaction of the judgments which had already been rendered in those cases; and the second authorizes the judge of the superior court at St. Augustine to receive, examine, and adjudge all claims for losses in the years 1812 and 1813 which might, within one year from the passage of that act, be presented to him. There is no provision in that act for the payment of the judgments authorized by its second section. Unless they can be paid under the act of 1823, there is no authority given by law anywhere for their payment. I regard the two acts as constituting parts of the same system, and to be interpreted precisely as if they had been enacted at the same time. The judgments, then, under the act of 1834, were, like judgments under the act of 1823, to be reported to the Secretary of the Treasury, and paid by him, upon his being satisfied that they were just and equitable, within the provisions of the treaty. But it is clear that such could not have been the case if Congress had not intended by the act of 1834 to declare, in effect, that the losses of 1812 and 1813 were injuries under the ninth article of the treaty; for, if Congress had not so intended, the second section of that act would have been not only inconsistent with itself, but wholly nugatory.

There can be no doubt, then, I think, that the petitioner's case was embraced by the ninth article of the treaty.

II. I propose now to inquire whether the treaty stipulated for a judicial tribunal, before which the claims therein contemplated should be established.

The words of the English original, which relate to this point, are, "which, by process of law, shall be established." The phrase "process of law" is a technical one in our jurisprudence, and its meaning is accurately defined and well understood. It had its origin in England, at least as far back as the days of Lord Coke, and no

doubt, so far as I am advised, has ever been expressed by any judicial tribunal as to its interpretation. In the famous *Magna Charta* of England it was provided that no freeman should be taken or imprisoned, or disscized of his freehold, &c., but by the law of the land, or the judgment of his peers. The words "by the law of the land" mean, we are informed by Lord Coke, "by due course and process of law," which he explains to be "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law."—(2 Inst., 45, 50.) The terms, then, "by the law of the land" and "by due process of law," are, in English jurisprudence, of precisely the same import, and it is from this source that we have derived them. They have been regarded as of so much importance that, either in the one or the other form, they have been inserted in the Constitution of the United States, and in the constitution of almost every State in the Union. They are there designed to be, as they are in *Magna Charta*, a restriction upon legislative authority. The words "by the law of the land" do not, therefore, mean merely an act of the legislature, for that construction would render the restriction absolutely nugatory. Their meaning, indubitably, is, that no citizen shall be disfranchised, or deprived of any of the rights of person or property, without a regular trial, according to the course and usage of the common law.—(Taylor vs. Porter, 4 Hill R., N. Y., 146; Hoke vs. Henderson, 4 Dev. N. C. R., 15.) "The better and larger definition of *due process of law* is," says Chancellor Kent, "that it means law in its regular course of administration through courts of justice."—(1 Kent's Com. 8th ed., 613-'14.) "*Due process of law*," says Judge Tucker, "must then be had before a judicial court, or a judicial magistrate."—(1 Tucker's Blk., part I, app., 203.)

The ordinary or common meaning of the words "process of law," is their technical meaning. In other words, they have no common or ordinary meaning, as contradistinguished from their technical meaning. They were, as we have seen, used by Lord Coke to explain the words "law of the land," as if they were already well known and fully understood. The term *process*, at the common law, in civil cases, is defined to be the means of compelling a defendant to appear in court.—(3 Blk. Com., 279.) *Processus*, a *procedendo ab initio usque ad finem*, is so called because it proceeds or goes out upon former matter, either original or judicial, and has two significations: First, it is largely taken for all the proceedings in any action or prosecution, real or personal, civil or criminal, from the beginning to the end. Secondly, that is termed the *process*, by which a man is called into any temporal court, because it is the beginning or principal part thereof, by which the rest is directed; or, taken strictly, it is the proceeding, after the original, before judgment.—(Britton, 138; Lamb., lib. 4; Crompt., 133; 8 Rep., 157; 5 Jacob's Law Dic., 302, 303.) It is, in the larger sense, that the words "process of law" are, in civil matters, equivalent to the words "the law of the land;" and hence it is that when a common-law lawyer speaks of establishing a thing by "process of law," he is understood to refer to a judicial

ceeding—a proceeding before a judicial court, or a judicial magistrate.

Such being the meaning of the words “process of law” in our jurisprudence, I can conceive of no good reason why they should be understood in a different sense in the 9th article of the treaty of 1819. The object in using them was to give an assurance to his Catholic Majesty that his subjects should be allowed to establish their claims before a judicial court, or a judicial magistrate, it must be conceded that no more appropriate language could have been used for that purpose. The promise was made by the United States—it proceeded from them—and there was a propriety in expressing it in their language. The tribunal contemplated was their tribunal; the proceeding, such as is customary with the citizens of the United States. Hence, we would naturally expect that the stipulation should be made in language appropriately descriptive of such a tribunal and such a proceeding in the United States, and having a clear and well-defined meaning. None more expressive or better understood could have been selected. And, moreover, there was a peculiar appropriateness in the words used, for the further reason, that, by reference to the constitution of the United States, and the well-established meaning of the words “process of law” as there used, the most satisfactory assurance could be given to the Spanish minister of their true meaning, when proceeding from us.

Hence, it seems to me that the conclusion is inevitable, that the words “process of law,” in the 9th article of the treaty, mean a judicial court, or a judicial magistrate; and that the stipulation which contains is, in effect, that means shall be provided by the United States to enable the Spanish officers and individual Spanish inhabitants to establish the injuries which they had suffered before such a court or magistrate. Such would be my conclusion if the 9th article constituted the entire treaty. But when I turn to the 11th article, and there find a special commission expressly provided for the settlement of claims due to citizens of the United States, my convictions are strengthened, and all doubt is removed. If it had been the intention of the high contracting parties to provide for the appointment of a board of commissioners under the 9th article, it is difficult to conceive why they did not use language clearly expressive of that intention, as they did in the 11th article. The truth is, that there was a difference of intention, and hence the difference in the language which was used. Under the 9th article, where Spanish subjects were concerned, a stipulation was required that their claims should be established before a judicial court, or a judicial magistrate; whilst under the 11th article, where citizens of the United States alone were concerned, a special commission was provided for. “The several editing and penning of the different branches doth argue that the maker did intend a difference of the purview and remedies.”—*Edrick’s case*, 5 Rep., 119.)

These views seem to me to be conclusive upon this point; but if any doubt could remain in regard to it, it must be entirely removed by the corresponding provision in the Spanish original. The language here used is, “judicially prove according to law.” In a note to the

translation, kindly furnished me by the solicitor, the translator says: "The translation might be varied and the meaning still preserved; but, to be correct, it must convey the idea that the injuries (named in the treaty) are to be proved by judicial proceedings of some kind, conducted in legal manner and form—*legalmente*." Language cannot be plainer than this. To undertake to explain it further would be a vain and useless task. It leaves not a loop to hang a doubt on as to its meaning. It fully sustains the construction which I have put upon the words "process of law."

III. The next point to be considered is, whether the United States, in stipulating that they would cause satisfaction to be made for the injuries embraced by the 9th article of the treaty, undertook to pay the sufferers, not only the actual value of the property which they lost, but interest on such value, by way of damages for the loss of the use of the property from the time the injury was committed.

It is believed that it has been the uniform practice of the government of the United States to demand, and not only to demand, but to receive, from foreign nations, interest in all such cases. If this be true, there can be no doubt as to the meaning of the 9th article of the treaty in this respect; for the idea is not to be tolerated for a moment, that they would demand as an act of justice an indemnity for their citizens which they would not, under similar circumstances, grant to a foreign nation for its citizens or subjects. The law of nations does not mean one thing when they are demanding a reparation for an injury, and just the opposite thing when a similar demand is made against them. They regard it as the same in both cases. If interest would be due *to* them in a given case, it would, if the case were reversed, be due *from* them. They have always demanded interest, because they believed that, according to the law of nations, it was due to them. They desire to observe good faith and justice towards all nations. They ask for nothing that is not clearly right, and submit to nothing which is wrong.

A case, which involved the question of interest, arose under the treaty of 1794 between the United States and Great Britain. In the seventh article of that treaty, the British government stipulated that compensation should be made to citizens of the United States for "losses and damages by reason of irregular or illegal captures or condemnations of their vessels and other property, under color of authority or commissions from his Majesty." In the same article provision was made for the appointment of five commissioners "for the purpose of ascertaining the amount of any such losses and damages."—(8 Stat. at L., p. 121.) This commission, it is believed, allowed *interest* as a part of the damages in all instances.—(See 2 Amer. State Papers, Foreign Relations, pp. 119, 120, 387, 388.) Dr. Nicholl, in the case of the "Betsy," stated the rule of compensation as follows: "To reimburse the claimants the original cost of their property and all the expenses they have actually incurred, together with *interest on the whole amount*, would, I think, be just and equitable compensation. This, I believe, is the measure of compensation usually made by all belligerent nations, and accepted by all neutral nations, for losses,

ts, and damages occasioned by illegal captures."—(Wheaton's Life Pinkney, pp. 198, 265, note, and 371.)

By the 21st article of the treaty of 1795 between the United States and Spain it was agreed that "all differences on account of the losses sustained by the citizens of the United States, in consequence of their vessels and cargoes having been taken by the subjects of his Catholic Majesty, during the late war between Spain and France," should "be referred to the final decision of commissioners to be appointed" as herein provided for. The commissioners were to "be sworn impartially to examine and decide the claims in question, according to the merits of the several cases, and to justice, equity, and the law of nations." They awarded interest on the value of the vessels and cargoes.—(2 Amer. State Papers, Foreign Relations, p. 283.)

A difference arose between the United States and Great Britain in regard to the construction of the first article of the treaty of Ghent, and by the fifth article of the convention of 1818 they agreed to refer to some friendly sovereign or State, to be named for that purpose.—

Stat. at L., 249–50.) The emperor of Russia was named by both governments, and accepted the umpirage.—(4 Amer. State Papers, Foreign Relations, 645.) He awarded that the United States were entitled to claim from Great Britain a *just indemnification* for all private property which the British forces may have carried away.—

Stat. at L., 282.) A special commission was then instituted for the purpose of ascertaining and determining the amount of indemnification which might be due to citizens of the United States under the decision of his Imperial Majesty.—(8 Stat. at L., 284.)

The commissioners disagreed as to the proper measure of damages, and, in consequence of that disagreement, the commission was broken up. Mr. Cheves, the commissioner on the part of the United States, insisted upon the allowance of interest. He said: "The claim is not interest *eo nomine*; it is adopted as a mitigated rule of damages, compensation, or indemnification, founded on the estimated pecuniary value of the article withheld. In that case the common law and the civil law are both clear in allowing reparation of the loss of the use of the thing withheld from the commencement of the tortuous detention. The rule of the public law is the same." \* \* \* "Indemnification means a reimbursement of a loss sustained. If the property taken away on the 17th February, 1815, were returned now, uninjured, it would not reimburse the loss sustained by the taking away and consequent detention; it would not be an indemnification. The claimant would still be unindemnified for the loss of the use of his property for ten years, which, considered as money, is nearly equivalent to the original value of the principal thing; so, in substituting pecuniary value for the thing, unless interest is allowed for the use of the money, the claimant will remain unindemnified."

The subject was submitted by the Secretary of State to Mr. Wirt, the Attorney General, and his opinion sustains the views of Mr. Cheves in all respects. He said: "And then the only remaining inquiry is, what is the award? It is, that the United States are entitled to a *just indemnification* for the slaves and other property carried away by the British forces, in violation of the first article of the



treaty of Ghent. What is a *just indemnification* for a wrong? Is it the reparation of the one-half or two-thirds of that wrong? Is it anything less than a reparation of the whole wrong? On these few simple ideas the whole question turns. If an injury is *justly redressed* which is only *half redressed*, then the British commissioner is right; but if an injury is only redressed when the redress is commensurate with the whole extent of the injury, then he is wrong. Let us put aside the emphatic and striking word *just*, and take the word *indemnification* alone. What does the word indemnification mean? The *saving harmless from danger*. Is that man saved harmless from danger who is left to bear *one-half* of the damages himself? The question seems to me too plain for discussion." \* \* \*

"In violation of this treaty, the slaves, and other property of American citizens, were carried away in the year 1815, and have been detained from them ever since. They have thus lost the *use* of this property for *eleven years*. Is the meagre return of the average value at the time the slaves and other property were thus taken from them a *just indemnification of the whole wrong*? That the act of taking away the property *was a wrong* is no longer a question. Whatever disposition there may be to make it a question, it has been settled by the tribunal of the party's own choice, and can no longer be made a question. The first act of dispossession being thus established to be a wrong, is the continuance of that dispossession for eleven years no wrong at all? Is it consistent with that usage of nations which Sir John Nicholl recognizes to redress an act of wrongful violence by the return, *at any distance of time*, of the naked value of the article at the date of the injury?" \* \* \*

"Upon the whole, sir, I am of the opinion that the just indemnification awarded by the emperor involves not merely the return of the value of the specific property, but a compensation also for the subsequent and wrongful detention of it, in the nature of damages. If the actual damages in each case could be ascertained, they ought, under the award, to be decreed; but since this, if not impracticable, would be a work of great labor and time, I am of opinion that the interest, *according to the usage of nations*, is a necessary part of the just indemnification awarded by the emperor of Russia."—(2 Opin. Attorney Gen., pp. 31, 32, 33.)

Subsequently, Mr. Clay, Secretary of State, in a letter addressed to Mr. Vaughan, the British minister, adopted and fully approved these views. He said: "We are prepared to show, if it were proper now to enter upon this discussion, that *interest* is a fair and just component part of the indemnification which the convention stipulates, and that, *without interest*, it would fall far short of the intentions of his Imperial Majesty's decision."

These claims were finally compromised between the United States and Great Britain. The United States accepted the payment of the gross sum of \$1,204,960. Mr. Cheves had previously estimated the claims at \$1,250,000, including principal and interest, the interest being about \$464,000. In the compromise, therefore, the United States received \$418,000, instead of \$464,000, for *interest*. They did not, therefore, yield the *principle*, under which they had so strenu-

usly insisted they were entitled to interest. On the contrary, it was, in substance, conceded to them. And the commission appointed by the government of the United States to adjust these claims awarded to each claimant the value of his property carried away, with *interest* hereon from the time of the exportation, thus recognizing the principal value and *interest* thereon as the proper measure of indemnity.

The brigs *Encomium* and *Comet* were wrecked on the keys of the Bahamas, and slaves on board belonging to citizens of the United States were forcibly seized and detained by the local authorities. Indemnity was immediately demanded by the government of the United States of the British government. The result was, that the British government paid to the United States the value of the slaves, with *interest* on such value, at the rate of four *per centum per annum*, from the date when the slaves were seized by the officers of the customs at the Bahamas up to the period when the compensation was actually paid, and the expenses incurred by the claimants in procuring evidence to support their claims.

Our minister, the Hon. Andrew Stevenson, who, with distinguished ability, conducted, on the part of the United States, much of the negotiation which occurred in these cases between the two governments, and successfully brought them to a close, in his letter to Lord Palmerston of December 4th, A. D. 1838, said: "The last and remaining question is that of interest on the estimated value of the slaves, and the time from which it should accrue. That the claimants have the same right to interest on the value of these slaves that they have to the value of the slaves themselves, and that, too, from the period of their seizure and detention, is a proposition which the undersigned would not have deemed it either necessary or proper to discuss, if he did not understand the decision of her Majesty's government, communicated in Lord Palmerston's note, as asserting directly the contrary doctrine. Regarding such a decision, upon principle, as of much higher importance than even the pecuniary interests which it involves, the undersigned feels it incumbent on him, in dissenting wholly from the grounds taken by her Majesty's government, to give the subject a more particular examination than he should otherwise have felt it needful to do." \* \* "It has, moreover, never been refused in claims like the present, where a money equivalent has been substituted as a compensation for property wrongfully withheld, and for which the party had agreed to make reparation."

He examined the subject at considerable length, and with great ability, both upon principle and authority. "The general doctrine, then," he said, "is this: that he who withholds what he ought to return, does an injury for which he is bound to indemnify the sufferer; that the proper measure of indemnification is the thing which is withheld, together with its reasonable fruits or profits accruing during the period that it is so withheld; that if restitution of the property, however, cannot be had, justice finds its compensation in its value as an equivalent, and interest on it is resorted to as the best standard by which to ascertain the reasonable profits of money."—(Senate Doc., 3d session 25th Cong., No. 216, p. 53.)

Subsequently, Lord Palmerston, in his letter to Mr. Stevenson of

May 2, A. D. 1839, said: "Her Majesty's government is, moreover, of opinion that, considering all the circumstances which have delayed the admission and adjustment of these claims, interest, at the rate of four *per cent. per annum*, may, with justice, be demanded from the British government upon the sums assigned as compensation on account of the slaves in question, and that such interest ought to run from the dates when those slaves were seized by the officers of the customs at the Bahamas up to the period when the compensation shall be actually paid."—(Senate Ex. Doc., 1st sess. 25th Cong., No. 119, p. 8.) It is fair to conclude, therefore, that the British government, against whom the demand for compensation was made, fully concurred with that of the United States in the principle, that in such cases interest justly constitutes a part of the indemnity.

By the convention of the 11th April, A. D. 1839, between the United States and Mexico, provision was made for the appointment of a commission, to which should be referred the claims of citizens of the United States upon the Mexican government, and power was given to the commissioners "to decide upon the justice of the said claims and the amount of compensation, if any, due from the Mexican government from the time the wrong was committed.—(Ex. Doc., 27th allowed to the claimants the value of their property taken, with interest in each case."—(8 Stat. at L., 528, 530.) The commission

In the case of the claims of citizens of the United States against Brazil, interest was claimed and allowed.—(Ex. Doc., 1st sess., 25th Cong., H. of Rep., Doc. 32., p. 249.)

Other instances might be cited, but these, surely, are sufficient to show, not only the views, but the uniform practice of the government of the United States upon this subject. I am warranted by them in laying it down as a rule, fully recognized by the United States, that in all cases like the present, where satisfaction is to be made for injuries done to personal property, interest is justly demandable as a component part of the damages. Our diplomatic agents, as we have seen, have always insisted that this doctrine was sustained, not only by the law of nations, but by both the civil and common law.

"In estimating," says Rutherford, "the damages which any one has sustained, where such things as he has a perfect right to are unjustly taken from him, or withholden, or intercepted, we are to consider, not only the value of the thing itself, but the value, likewise, of the fruits or profits that might have arisen from it. He who is the owner of the thing is, likewise, owner of such fruits or profits, so that it is as properly a damage to be deprived of them, as it is to be deprived of the thing itself."—(Rutherford's Institutes, B. I, ch. 17, § 5, p. 390-1. See, also, 1 Domat, Book III, tit. V, sections 1, 2, and 3, pp. 740, 789, Cushing's ed.)

When a nation cannot obtain justice, whether for a wrong or an injury, she has a right to do herself justice. Among the various methods practiced among nations, short of actual war, of obtaining satisfaction, is "by making reprisals upon the persons and things belonging to the offending nation until a satisfactory reparation is made for the alleged injury."—(Wheaton's Inter. Law, part IV, ch. 1, § 1.)

reprisals are used between nation and nation in order to do themselves justice when they cannot otherwise obtain it. If a nation has been in possession of what belongs to another, if it refuses to pay a debt, *repair an injury*, or to *give adequate satisfaction for it*, the latter may seize something belonging to the former, and apply it to its own advantage, till it obtains payment of what is due, *together with interest and damages*, or keep it as a pledge till the offending nation has received ample satisfaction. The effects thus seized are preserved while there is any hope of obtaining satisfaction or justice. As soon as that hope disappears, they are confiscated, and then reprisals are accomplished."—(Vattel, Book II, ch. 18, § 342. See, also, Wheaton's Int. Law, part IV, ch. 1, § 3.) If Spain had failed to obtain, by treaty, satisfaction for the injuries which her subjects had suffered, she might lawfully have resorted to the harsher method of reprisal. But what she might rightfully have obtained by force, if it had been denied her, was voluntarily stipulated for and promised by the treaty. It needs no argument to show that the measure of satisfaction must be the same in the one case as in the other.

The decisions of the courts of admiralty are based on the law of nations. "The court of prize is emphatically a court of the law of nations, and it takes neither its character nor its rules from the mere municipal regulations of any country."—(Per Story, J., in delivering the opinion of the court in the case of the Schooner *Adeline*, 9 Cranch R., 284.) It is believed to be the uniform rule of those courts, in decreeing satisfaction for wrongs, in cases not calling for aggravated or vindictive damages, to take the value of the property lost, at the time of the loss, and, in case of injury, the diminution in value by reason of the injury, with *interest* upon such valuation, as the true measure of damages. The *Amiable Nancy*, 3 Wheaton R., 546, 560-1: "This decree," says the court in that case, "may not secure a complete indemnity for all possible injuries; but it has certainty and general applicability to recommend it, and, in almost all cases, will give a fair and just recompense."—(3 Wheaton R., 560-1.) The same doctrine had been previously held in the cases of *Del Col vs. Arnold*, 3 Dall. R., 13, and *The Ann Maria*, 2 Wheat. Rep., 327. See, also, the cases of *Murray vs. Schooner Charming Betsy*, 2 Cranch R., 64; *Maley vs. Battuck*, 3 Cranch R., 458; *Schooner Lively*, 1 Gallison R., 315, 312; all of which are accordant. In the case of the *Appollon*, 9 Wheat. R., 362, 377, Story, J., in delivering the opinion of the court, stated the rule thus: "Where the vessel and cargo are lost or destroyed, the just measure has been deemed to be their actual value, together with *interest* upon the amount from the time of the trespass. Where there has been a partial injury only, that loss being ascertained, a similar rule has been applied. Where the property has been restored after detention, demurrage during the period has been generally allowed for the vessel, and interest upon the value of the cargo. Where the vessel and cargo have been sold, the gross amount of the sales, together with interest, has been adopted as a fair recompense, and an addition of ten *per cent.* has been sometimes made, where the property was sold under disadvantageous circumstances, or had not arrived at the country of its destination. Such, it is believed, have

been the rules most generally adopted in practice, in cases which did not call for aggravated or vindictive damages. And it may be truly said, that if these rules do not furnish a complete indemnification in all cases, they have so much certainty in their application, and such a tendency to suppress expensive litigation, that they are entitled to some commendation upon principles of public policy."

The decisions of the admiralty courts of Great Britain are in accordance with those in the United States in regard to the allowance of interest, as constituting a part of the measure of damages in such cases. *The Acteon*, 2 Dodson R., 48; *The Lucy*, 3 Rob. R., 208; *The Driver*, 5 Rob. 145. The council of prizes in France, in the case of *The Pigeon*, reported in a note to *Schooner Charming Betsy*, 2 Cranch R., 98, 101, recognize the same rule.

At the common law, in cases of torts, the party injured, where there are no circumstances of aggravation, is entitled to satisfaction for the injury sustained by the taking and detention, and the measure of damages is the value of the property taken, with interest from the time of the taking down to the trial. This is generally considered the extent of the damages sustained, and is deemed legal compensation, which refers solely to the injury done to the property taken, and not to any collateral or consequential damages resulting to the owner by the trespass. These are taken into consideration only in a case more or less aggravated. Such is the rule in action of trespass and of trover.—(*Conrad vs. The Pacific In. Co.*, 1 Bald. R., 138; 8 C., 6 Peters R., 262; *Conrad vs. Nicoll*, 4 Peters R., 291; *Fisher vs. Prince*, 3 Burr. R., 1363; *Mercer vs. Jones*, 3 Camp. R., 476; *Dillenback vs. Jerome*, 7 Cowen R., 294; *Barry vs. Bennett*, 7 Metcalf R., 354; *Banks vs. Hatton*, 1 Nott & McCord R., 221; *White vs. Webb*, 15 Conn. R., 502; *Jacobs vs. Laussat*, 6 S. & R., 350; *Wilson vs. Conine*, 2 Johns. R., 280; *New Orleans Draining Co. vs. De. Lazardi*, 2 La. Ann. R., 281; *Baker vs. Wheeler*, 8 Wend. R., 504; *Stevens vs. Lowe*; 2 Hill, R. 133; *Clark vs. Whitaker*, 19 Conn. R., 320.) Many other cases might be cited, but these are surely sufficient. If there be any case in which the doctrine that interest should constitute a component part of the measure of damages in such cases is even questioned, I am not aware of it.

There can be no doubt, then, that the practice of the United States, in their intercourse with foreign nations, in relation to this subject, and the doctrine which their diplomatic agents have uniformly asserted and maintained, are fully supported by the well-established principles of both public and municipal law.

IV. I propose, now, briefly to consider at what time, according to the treaty, the title of the petitioner's intestate to the satisfaction contemplated by the treaty would become absolute. Upon this point, it seems to me, there is no room for doubt. The stipulation of the United States is express, that they will cause satisfaction to be made for the injuries, if any, which by process of law shall be established. As soon, therefore, as the injury should be thus established, this stipulation would become direct and unconditional. The pecuniary value of the injury would then be ascertained, and the obligation to pay it perfect and complete. The object of requiring the injury to be estab-

shed was twofold : (1) to determine its existence, and (2) to fix its value in money. As soon, then, as the injury should be established, the treaty would become, in effect, a stipulation on the part of the United States to pay the money equivalent thus ascertained. The treaty then would, in effect, be the same as if the injuries had been already established at the time of making the treaty, and the stipulation had been direct to pay the amount thereby ascertained. Therefore, upon the rendition of the judgment establishing the injury, the United States would become absolutely bound to pay *the amount* thereof to the petitioner. This, it seems to me, is self-evident.

It seems to me, therefore, regarding this case as it stood under the treaty, to be clear, (1) that the petitioner's intestate was entitled to the benefit of the ninth article of the treaty ; (2) that under that article he was entitled to a judicial tribunal, before which to have the injury which he suffered established ; (3) that the satisfaction contemplated by the treaty was the value of his property which was lost or destroyed, with interest on such value from the time of its loss or destruction, at least till the date of the judicial establishment of the injury ; and (4) that, upon the judicial establishment of the injury, the United States would become absolutely and unconditionally bound to pay the pecuniary value of the injury thus ascertained, to wit, *the amount* of the judgment. Such, it seems to me, were the clear and indisputable rights of the petitioner's intestate under the treaty. If this be true, then the public faith of the United States was pledged to Spain that they should be secured to him ; and the United States were bound by the faith of treaties—that most sacred of all obligations among the nations of the earth—well and truly to redeem this pledge, not merely in form, but in substance.

V. It remains now to inquire whether Congress has adequately provided for the faithful execution of the ninth article of the treaty. With the utmost deference and respect for those who differ with me on this point, I venture to express the opinion—for it is abundantly clear to my mind—that such provision has been made, and made, too, to carry that article into effect in precise accordance with my construction of it.

I cannot be wrong in saying that it is proper, in construing the acts of Congress passed for this purpose, to consider them in connexion with the ninth article of the treaty ; to regard them and the ninth article as constituting one whole ; and so to construe them as, if possible, to make them harmonize with that article, and with each other. "This understanding of the article must enter into our construction of the acts of Congress on the subject," said Mr. Chief Justice Marshall, in *United States vs. Perchman*, 7 Peters' R., 89. There can be no doubt that the act of 1823 was passed to carry the ninth article of the treaty into effect. Its object is expressly declared in the title, and plainly set forth in the enacting clauses. Such, indubitably, was its intention.

If, then, Congress did not, by the act of 1823, adequately provide for carrying into effect the ninth article of the treaty of 1819, it was not because they did not *intend* to do so, but because that intention has not been sufficiently declared. In the construction of that act,

therefore, our attention must be directed not so much to the inquiry as to what was in the mind of the legislature at the time of its enactment, but to the meaning of the language which was employed. The object of the law is known to us with indubitable certainty. But the reason of the law—that is to say, the motive which led to the making of it, and the object in contemplation at the time—is the most certain clue to lead us to the discovery of its true meaning; and great attention should be paid to this circumstance, whenever there is question either of explaining an obscure, ambiguous, indeterminate passage in a law or treaty, or of applying it to a particular case. When once we certainly *know* the *reason* which *alone* has determined the will of the person speaking, we ought to interpret and apply his words in a manner *suitable* to that *reason alone*. Otherwise he will be made to speak and act *contrary* to his *intention* and in *opposition* to his *own views*.—(Vattel, Book II, ch. 17, § 287.) It is a rule in the interpretation of a deed—indeed, the general rule for all interpretations—that when we meet with any obscurity in it, we are to consider what probably were the ideas of those who drew up the deed, and to interpret it accordingly.—(Ibid., § 270.) And when we evidently see what is the sense that agrees with the intention of the contracting parties, it is not allowable to wrest their words to a contrary meaning.—(Ibid., § 274.) And we ought always to affix such meaning to the expressions as is most suitable to the subject or matter in question.—(Ibid., § 280.)

Let us apply these rules to the construction of the act of 1823. That act was passed to carry into effect the ninth article of the treaty of 1819. This was the motive which led to its passage, and the object in contemplation at the time. It was the reason which alone determined the will of the legislature in its enactment. We ought, then, to interpret and apply its words in a manner suitable to that reason alone, otherwise the legislature may be made to speak *contrary* to their *intention*, and in *opposition* to their *own views*. The treaty, as we have seen, requires that Congress should provide a judicial tribunal, before which the claimants should be afforded an opportunity of presenting their claims in order to their establishment. This was one of the leading objects of the treaty. Was effect given to it by the act of 1823? The first section of that act refers those claims to the decision of “the *judges* of the *superior courts* established at St. Augustine and Pensacola, in the Territory of Florida, respectively.” At that time the judicial power in Florida was vested in two superior courts, and in such inferior courts and justices of the peace as the legislative council of the Territory might, from time to time, establish. Each superior court consisted of one judge.—(3 Stat. at L., p. 656, § 6.) The judges, then, of the superior courts of Florida were *judicial magistrates*, in the proper sense of those terms. They are described in the first section of the act of 1823 by their official titles, and a duty, judicial in its nature, is assigned to them. The duty is judicial in its nature, because the injuries were to be judicially established. I do not pause to inquire whether, inasmuch as each of those courts consisted of one of those judges, in assigning jurisdiction to the judge, the act did not *ipso facto* assign jurisdiction to the court? It

not necessary to express an opinion whether such was the effect of the act. But whether it was or not, is, in my view, not material to the point now under consideration; for whether the assignment was the one or the other, it was an assignment to a judicial court, or to a judicial magistrate. Considering the first section of the act of 1823 with reference to the rules of construction, to which I have adverted, it is clear to my mind that, it being already known and declared in effect by the act itself that the legislature intended to assign a judicial duty to a judge or a court, and in the act the judge is described by his official character, and authority is given him "to receive and adjudge," the duty is *judicial*, and imposed upon him in his judicial character. But when, in addition to this, the claims thus to be adjudged are described as *all claims arising within his jurisdiction*, there does not seem to be room for the slightest doubt, for it is in his judicial character, *and in that alone*, that the judge has *jurisdiction*.

It will be observed that I have used the word "adjudge." The term used in the first section of the act is "adjust." It is too plain to require an argument to prove it, that the word "adjust" is there used in the sense of "adjudge." In the second section, the judges are said to *decide*, and the result of their acts is spoken of as *decisions*, and the proper word "adjudge," in connexion with their acts, is actually used. And, moreover, they are required by the first section to receive and *adjust* the claims "*agreeably to the provisions of the treaty*," and they could not *adjust* them *agreeably* to the provisions of the treaty otherwise than *judicially*, for the treaty required that they should be *judicially* established. The terms used in the treaty are "*by process of law \* \* \* established*." It certainly cannot be necessary to state what is meant when we say that a matter shall be *judicially established*.

This construction conforms to the ideas of the legislature in the enactment of the law; it does not wrest their words to a meaning contrary to their intention; and it affixes to the words used the meaning most suitable to the subject-matter in question. Full force and effect are given to each word, and each word is construed according to its ordinary meaning. The only seeming exception is, in interpreting the word "adjust" in the sense of "adjudge." For this, however, adequate reason has already been assigned. It is required by the subject-matter to which it refers, and its connexion with and relation to the other words in the section. It is also sustained by authority. Every statute ought to be expounded, not according to the letter, but according to the meaning.—(11 Rep., 73.) Hence *quantity* may be construed *value*, (Dwarris on Stat., 557,) and *value* may be construed *price*, where such was the intent.—(Marriott vs. Brune, 9 How. R., 619.)

Let us now see whether there is anything in the second section of the act of 1823 at all in conflict with these views. Here, again, the judges are spoken of by their official titles; mention is made of the cases in which they shall *decide* in favor of the claimants; and their acts are called *decisions*. It requires only the decisions *in favor* of the claimants to be reported to the Secretary of the Treasury. The reason for this is obvious. Those only whose injuries should be *judicially*



established were, under the treaty, entitled to the satisfaction thereby stipulated. Their cases, therefore, and theirs *only*, ought to have been reported to the Secretary of the Treasury. Where the decisions were *against* the claimants, their claims, so far from being *judicially* established, were *judicially* rejected, and, therefore, did not come within the provisions of the treaty. They had failed to comply with the condition on which the title to satisfaction depended. If it had been the intention of the statute to confer on the Secretary of the Treasury a revisory appellate power over the decisions of the judges, it would strike every fair and impartial mind as an act of great hardship and injustice that the decisions of the judges should be final and conclusive when *against* claimants, but subject to revision and reversal when in their *favor*. Such an act of legislation, in reference to these claims especially, would have been wholly unjustifiable; and, to my mind, it is clear that such was not the intention or the effect of the act of 1823. Under my construction, the justice and propriety of the provision are clear and striking.

Thus far, then, the second section of the act of 1823 is consistent with the construction which I have put on the first section; and, to my mind, it is plain that in all other respects it is equally consistent with it. It declares that "the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the *same is just and equitable, within the provisions of the said treaty*, shall pay *the amount thereof* to the person or persons in whose favor the same is adjudged." Let it be borne in mind that it was the duty of Congress, if the ninth article of the treaty was to be carried into effect at all, to provide (1) the ways and means by which the claims might be established; and (2) that, when established, due satisfaction should be made. The stipulation of the treaty extended alone to claims "which, by process of law, shall be established." The first object is provided for in the first section, and the second section provides for the second object. As the satisfaction was to be made in money, it was proper to provide that, when required for that purpose, it should be drawn from the public treasury under such guards as to protect the United States from injustice. It was only necessary, therefore, to devolve a mere *executive* duty upon the Secretary of the Treasury; and this, it seems to me, was precisely the character of the duty imposed upon him. It would have been impolitic to have made it merely *ministerial*, but it would have been unjust, and a breach of the public faith, to have made it anything more than merely *executive*.

Let me inquire what, in all fairness, as well to the claimants as to the United States, ought to have been the substantial provisions of the second section of the act of 1823? It will occur at once to every just and impartial mind, that the claimant, on presenting himself at the Treasury Department, ought to have been required to show (1) that his claim had been *judicially established*, as required by the treaty and the first section of the act; and (2) that his case was one which the judge, who decided it, was authorized to decide. Nothing more and nothing less ought to have been required. Nothing more *could* have been required without a violation of the treaty; and noth-

ness, without an omission of the usual vigilance with which the treasury is guarded. As soon as the injury of which he complained was judicially established, the claimant, as we have seen, was absolutely entitled to the satisfaction provided for in the act; and nothing further could justly have been required of him but that, when he presented his claim to the Treasury Department for payment, he should show the judgment and the authority of the court which rendered it.

These requirements would be in precise accordance with what occurs in reference to all judicial proceedings. Whenever a judgment is rendered on, whether the court had jurisdiction, is always an open question. The want of jurisdiction may always be set up against a judgment, whenever it is sought to be enforced, or when any benefit is claimed under it. The want of jurisdiction renders it utterly void and unavailable for any purpose. "They constitute no justification; all persons concerned in executing such judgments or sentences are considered in law as trespassers."—(*Elliott vs. Peirsol*, 1 Peters' 340.) But the jurisdiction being established, the judgment becomes conclusive of the matters determined by it, as between the parties to it. (Ibid.; *Rose vs. Himley*, 4 Cranch R., 241, 269; *Thompson vs. Tolmie*, 2 Peters' R., 163; *Wilcox vs. Jackson*, 13 Peters' R., 13; *Lessee of Hickey vs. Stewart*, 3 How. R., 762, 763.)

Let me now proceed with the examination of the second section of the act of 1823. It requires the *evidence* on which the decisions are rendered to be reported to the Secretary of the Treasury, and this, it has been supposed, is indicative of an intention in the act to confer on that officer a revisory power over the decisions. But it is obvious that this was necessary, whether the power of the Secretary was to be revisory, or merely executive, and confined to the inquiry whether the court had jurisdiction. All jurisdiction is limited as to place, persons, and things.—(Per Holt, C. J., in *Annesley vs. Dixon*, Rep. 104, 105.) "Upon principle, it would seem that the jurisdiction of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the *state of the thing* as on the constitution of the court. If, by any means, a prize court should be required to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence."—(Per Mr. Chief Justice Marshall, in *Rose vs. Himley*, 4 Cr. R., 269.) "The power under which it acts must be looked into; and its authority to decide questions, which it professes to decide, must be considered."—(Ibid.) It is plain, therefore, that the evidence was as necessary to enable the Secretary to act upon these points, as upon the essential facts of the case. But why report all the evidence? Why not confine the report to so much of the evidence as might bear upon the

question of jurisdiction? It would have been much easier to give a general direction for this purpose than to carry it into effect; and if its execution would be at all practicable, of what advantage would it be? Every lawyer knows that but little, if any, practical good could result from it, whilst the duty which it would impose upon the judge would be exceedingly onerous and of difficult performance. It was simpler, and easier, and better, for all purposes, that the direction should have been general to report *the* evidence on which the decision was founded. It cannot be necessary to enlarge on this point.

But the Secretary of the Treasury must be satisfied "that the same is just and equitable, within the provisions of the said treaty." If these words gave him a revisory power, then the action of the judge was not *judicial*, and the injury was not *established* by his decision. Such a construction would render the act of 1823, which was professedly passed to carry the ninth article of the treaty into effect, altogether inconsistent with that article, and inconsistent with every other provision in the act itself. But it must not be forgotten that words and expressions have different force, sometimes even a quite different signification, according to the *occasion*, their *connexion*, and their *relation* to other words. The connexion and train of the discourse is, therefore, a proper source of interpretation. We must consider the whole discourse together, in order perfectly to conceive the sense of it, and to give to each expression, not so much the signification which it may *individually* admit of, as that which it ought to have from the *context* and *spirit* of the discourse. Such is the maxim of the Roman law. *In civile est, nisi totâ lege perspectâ, unâ aliquâ particulâ ejus propositâ, judicare, vel respondere.*—(Vattel, Book II, ch. 17, § 285.) We must interpret the act in such a manner that *all* the parts may appear *consonant* to each other, that what follows may agree with what preceded, unless it *evidently* appears that by the subsequent language the legislature intended to make some alteration in what preceded. The presumption is, that one and the same spirit reigned throughout the entire statute.—(Ibid., § 286.) In interpreting a statute, too, we must never lose sight of its *object*, for that is the truest exposition of a law which best harmonizes with its design, its objects, and its general structure.—(Dwarr. on Stat., 556.) The real intention, when collected with certainty, will always, in statutes, prevail over the literal sense of terms; for every statute ought to be expounded, not according to the letter, but according to the meaning.—(Ibid., 557.) And whilst it is true that the intention must be collected from the words used, still, in determining the meaning of the words, all the parts of the statute are to be compared, considered, and construed with reference to each other. Hence, general words may be restrained, and clauses may be controlled by clauses.—(Ibid., 574.)

I am warranted, then, in saying that if the words "just and equitable," in their largest and most comprehensive sense, would have the effect of giving a revisory power to the Secretary of the Treasury, thereby rendering the statute inconsistent with the treaty, and inconsistent with itself, and subversive of its professed object, then a more limited interpretation, which will avoid such a result, ought to be put upon them if they be fairly susceptible of such an interpretation.

Upon this point, to my mind, there is not the slightest difficulty. Indeed, it seems to me—and I express the opinion with deferential respect for the opposite view—that any other than the more restricted interpretation would do violence to the plainest dictates of reason, and to the well established principles of construction, to the obvious import of the words in the connexion in which they stand. Let me here repeat that, in considering this point, justice demands that we should bear in mind that the ninth article of the treaty requires, and that the first section of the act provides, that the injury, for which satisfaction was to be made, should be judicially established. This was to be done before the case could be carried to the Secretary of the Treasury. Upon the decision, together with the evidence, being presented to him, he was to consider whether the same was “just and equitable, within the provisions of the said treaty.” In determining this question, he was, it seems to me, in the nature of things, to consider (1) whether the injury had been judicially established; (2) whether it had been so established by the tribunal constituted by the act; and (3) whether it was a case coming properly within the jurisdiction of that tribunal. If these several points should be settled in the affirmative, then, to my mind, it is clear that the decision would be just and equitable, within the provisions of the treaty, in the true sense of those terms as they are there used. It had been rendered as required by the treaty and by the first section of the act passed to carry the treaty into effect, and how could it be said to be otherwise than just and equitable within the provisions of the treaty? It would stand before the treasury with its justice and equity proved and sustained by precisely the evidence which the provisions of the treaty require.

The Secretary of the Treasury was the officer through whom the satisfaction required by the treaty was to be made. To entitle a party to that satisfaction, to the payment of the money at the Treasury Department, he ought to be required to show a case just and equitable within the provisions of the treaty. This he would indubitably do by showing a case sustained by the evidence contemplated and required by the treaty. That evidence was a judgment rendered by a court of competent jurisdiction, establishing the injury for which he would demand satisfaction. If any more should be required, it is plain that the treaty would be violated, for by it the public faith of the United States was pledged that satisfaction should be made for the injuries which should, by process of law—*i. e.*, *judicially*—be established. The question to be presented to the Secretary of the Treasury was not whether, *agreeably* to the provisions of the treaty, an injury had been committed. That question had been decided, and decided, too, by the tribunal contemplated by the treaty and provided by the first section of the act. But the question before him was, whether, considering the case at the particular stage which it had reached when reported to him, the decision was “just and equitable, within the provisions of the said treaty?” A proper interpretation of the provisions of the treaty, in this respect, is clearly what I have just stated—that within those provisions the decision was just and equitable, if duly made, in a treaty case, by the proper tribunal.

The only thing which remained to be done, after the decision was

made, was to pay the amount thereof, to make the satisfaction ; and this was demanded not only by justice and equity, but by the faith of treaties. It surely cannot be pretended that in considering whether a decision was "just and equitable" the Secretary of the Treasury should have no reference to the treaty. The language used is "just and equitable within the provisions of the treaty," and not "just and equitable *and* within the provisions of the treaty." If no reference was to be had to the treaty, then it would have been the duty of the Secretary of the Treasury to consider whether, though the losses occasioned by the troops of the United States were, in fact, injuries, there were, nevertheless, not circumstances connected with our relations with Spain which rendered it unjust and inequitable that satisfaction should be made. But his powers indubitably did not extend that far. It was not meant that he should go behind the treaty. But if this be true—and that it is there can be no question—then the words "just and equitable" are not to be understood in their largest sense. The only question then is, what restriction is required? They are clearly to be limited by the treaty. If this be so, the conclusion at which I have arrived seems to me to be inevitable.

Taking my construction to be correct, we have no difficulty in understanding the remaining provisions of the second section of the act of 1823 : "shall pay *the amount thereof* to the person or persons in whose favor the same is adjudged." The amount of what? Plainly, of the decision, which the Secretary of the Treasury had become satisfied was just and equitable, within the provisions of the treaty. This was precisely the provision which good faith required. If the injury was established by a judicial decision rendered by a competent tribunal, then the satisfaction was due, and the precise satisfaction which had been adjudged. The Secretary of the Treasury ought, therefore, to have been, and to my mind it is plain that he was, required in every such case to pay *the amount* of the decision. If there were no *such decision*, then there was nothing due, and by implication the act directs that in such a case nothing shall be paid. The whole of the decision was due or none, and the whole or none was just and equitable within the provisions of the treaty. The word "same" in that part of the section, which reads "on being satisfied that the same is just and equitable," refers to the decision of the judge, and the subsequent words "the amount thereof" also refer to the decision of the judge. It necessarily follows, that the words "same is adjudged" refer to *the amount of the decision* ; so that this part of the section written in full would read : "on being satisfied that the decision of *the judge* is just and equitable, within the provisions of the said treaty, shall pay the amount of *the decision of the judge* to the person or persons in whose favor *the amount of the decision of the judge* is adjudged." It cannot, I am sure, be denied that such is the correct grammatical construction of this part of the second section. I admit that a departure from the grammatical sense of words may be allowed, but I venture the assertion that a case cannot be found where it has been sanctioned to defeat the object of the act. Where the grammatical sense of words is consistent with the motive which led to the passage of the act, and necessary to give effect to the object contemplated by

t, the grammatical sense is surely not to be departed from, but to be adopted as giving the true meaning of the statute. Such is alike the dictate of reason, and the well established rule of law.—(Dwarris on Statutes, 587.)

If, then, the grammatical construction of that part of the second section, to which I have just referred, be its proper construction, the words "just and equitable" in their larger sense are wholly irreconcilable with it. To give those words such larger sense, it is necessary either to make the words "the amount thereof" refer to the decision of the Secretary of the Treasury, or to strike out the word "the" and read as follows: "such amount thereof as he may deem just and equitable." According to the first view, this part of the second section written in full would read: "shall pay the amount of the decision of the Secretary of the Treasury to the person or persons in whose favor the amount of the decision of the Secretary of the Treasury is adjudged." According to the second view it would read: "shall pay so much of the decision of the judge as the Secretary of the Treasury may deem equitable and just, to the person or persons in whose favor so much of the decision of the judge as the Secretary of the Treasury may deem equitable and just is adjudged." Written as far as practicable with the relatives, according to the first view, it would read as follows: "shall pay the amount of the decision of the Secretary of the Treasury to the person or persons in whose favor such amount is adjudged." And written as far as practicable, with the relatives according to the second view, it would read as follows: "shall pay so much of the decision of the judge as the Secretary of the Treasury may deem just and equitable, to the person or persons in whose favor the same is adjudged by the Secretary of the Treasury." It is indisputable that the words "just and equitable" cannot be so interpreted as to give the Secretary of the Treasury a revisory power over the decisions of the judges, without taking such liberties with the subsequent part of the second section of the statute. Can this be justified by any principle of law or reason, when its necessary effect is to defeat the expressed object of the statute, and to impute bad faith to Congress? A case which will justify such a liberty for such a purpose, I venture most respectfully to affirm, cannot be found in the annals of jurisprudence. The great principles of justice, as well as the established rules of construction, and the decided cases, the rather dictate that the words "just and equitable" should be received according to a more restricted meaning.

The construction which I have given to the second section of the act of 1823 seems to me, therefore, to be the only construction of which the language there used is fairly and justly susceptible. It is, too, the only construction consistent with the treaty, and consistent with the first section of the act. Under it, and *it alone*, can the treaty, and the act of 1823 passed to carry the treaty into effect, be made a symmetrical and harmonious whole.

The construction which makes the judges mere commissioners, and gives the Secretary of the Treasury a revisory, appellate power over their decisions, renders the act, which was designed to carry the treaty into effect, ineffectual for that purpose. In doing this it departs from

the usual meaning of the words used, by declaring that in saying that *judges shall decide*, it meant that *commissioners shall award*; and that in saying that the claims should be received and *adjudged agreeably to the provisions of the treaty*, it meant a wholly different thing, to wit: the action of the commissioners, whose award, instead of *establishing* the injuries as the treaty requires, should only have the effect of a *master's* report in chancery, and be revised by the Secretary of the Treasury, who is not a judicial officer. It, moreover, gives to the words "just and equitable," which are always words of a relative meaning, to be received in a larger or more restricted sense, according to the connexion in which they stand, the most latitudinous construction, the effect of which is, to make it necessary to reject the natural and grammatical sense of the subsequent part of the second section, by making the words "amount thereof" refer to the action of the Secretary of the Treasury. And all this is done in utter disregard of the reason which alone determined the will of the legislature in the enactment of the statute, and in entire obliviousness of the avowed object for which it was passed. I, with humble deference, submit that this interpretation is a clear and palpable violation of the established rules of construction, and of the plain meaning of language.

It will be observed that I have thus far made no reference to the case of the United States *vs.* Ferreira, 13 How. R., 43. To the *actual decision* in that case, I yield implicit submission. I regard it as a part of the law of the land, and if it should ever come in question before me, I should feel that my conscience was bound by it. I yield to no man in profound respect for the opinions of the Supreme Court of the United States in all cases coming within the limits of their jurisdiction. But the reasoning of the court in making the decision in the case of the United States *vs.* Ferreira, though entitled to high, very high, respect, is not necessarily a part of the law of the land. The decision is authoritative; the reasoning of the court merely persuasive. The one, as a precedent, and to the same extent as other precedents, must be obeyed; the other respected only. The one may be a principle, and as such to be taken as established and unquestionable; the other is mere argument, and to govern only when it convinces. In the case of Richardson *vs.* Mellish, 2 Bing. R., 229, Best, C. J., said: "There are expressions used by the Chief Justice in that case which seem to bear on the present; but the expressions of every judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion. That is what we are to look at in all cases. *The manner in which he is arguing it is not the thing; it is the principle he is deciding.*" And Marshall, C. J., in Cohen *vs.* Virginia, said: "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connexion with the case in which those expressions are used. If they go beyond the case, they may be *respected*, but ought not to *control* the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question *actually before the court* is investigated with care, and considered in its full extent. Other principles which may serve to illus-

to it are considered in their relation to the case decided, but their possible bearing in all other cases is seldom completely investigated." What, then, was decided in the case of the *United States vs. Ferreira*? Merely that the Supreme Court had no jurisdiction in that case. It was the principle decided, and the only principle which could have been decided, because no other was involved in the case. The decision may be, and I doubt not is, altogether sound and correct, and the reasoning of the court unsatisfactory. There may be, and my conviction is that there are, other grounds, wholly unquestionable, which the decision might have been placed. It is clear to my mind that, whether the judges of Florida, under the acts of 1823 and 1834, acted as commissioners or as judges; whether their functions were judicial or those of commissioners merely, still the decision of the Supreme Court must have been precisely what it was. Even if the decision of the Florida judge had been regarded by the Supreme Court as technically a judgment, it certainly was not one of those cases to which the appellate power of that court has been extended by Congress; and there can be no doubt that the whole appellate power of that court exists only in those cases in which it is affirmatively given.—(*Wiscart vs. Dauchy*, 3 Dallas' R., 32; *Clark vs. Bazane*, 1 Cr. R., 212; the *United States vs. More*, 3 Cr. R., 159; *Arrousean vs. the United States*, 6 Cr. R., 307.)

I am not at liberty, then, in the discharge of my duty in this case, to be governed by the reasoning of the Supreme Court in the case of the *United States vs. Ferreira*, unless I am convinced by it. Notwithstanding the high source from which it comes, entitling it to the gravest and most careful consideration, still it would not be an honest and faithful discharge of my duty to do more than respectfully to weigh it, and give it that influence to which it is intrinsically, independently of its origin, entitled. It is not authority, which I must obey; it is merely the argument of a great man and of an enlightened court, upon which I am bound to bestow my best reflections and most careful deliberation. This I have done, and I trust that I may be pardoned for the presumption in saying that it has not convinced me. To be governed by it in this case would leave my conscience unsatisfied, and I can safely recognize no other monitor.

I do not propose to enter into a critical examination of the reasoning of the Supreme Court. That court itself, I know, would concede that, if Congress by the act of 1828, intended to impose a judicial authority upon the judges of the superior courts of Florida, it had full power to do so, and that such a duty was imposed, if the words of the act sufficiently express that intention. For the reasons which I have already assigned, my opinion is that such was the intention and effect of the act.

I may, however, be allowed most respectfully to suggest, that if, under the acts of 1823 and 1834, there was to be no suit, no parties in the legal acceptance of the term were to be made, no process to issue, and no one was authorized to appear on behalf of the United States, to summon witnesses in the case, it was because Congress did not, in its wisdom, deem it necessary or expedient to make a different provision. And if the proceeding was altogether *ex parte*, and all that



the judge was required to do was to receive the claim when the party presented it, and to adjust it upon such evidence as he might have before him, or be able himself to obtain; and if both the decision and the evidence were to be reported to the Secretary of the Treasury, and not filed in the court in which the judge presided, or recorded there, it was because Congress, in the exercise of the power "to regulate" the proceedings of the tribunal, saw fit so to provide. But the conclusion which has been deduced from these premises, that "it is too evident for argument on the subject that such a tribunal is not a judicial one, and that the act of Congress did not intend to make it one," I most deferentially submit, is a *non sequitur*. I do not understand the Supreme Court as affirming that a provision for any one or more of these purposes is essential to the constitution of a judicial tribunal. But if it was not, then the argument loses all its force. It seems to me that if Congress saw fit to waive, on the part of the United States, all advantage to be derived from this source, it had the power to do so. And it will be observed that it was as necessary to the protection of the real interests of the United States and of all concerned, before the judges as commissioners, as before them in their judicial capacity.

I beg leave also, with deference, to suggest, that possibly it may have been the intention of Congress that the statutes, to which I have referred, and the act of March 3, A. D. 1822, entitled "An act for the establishment of a territorial government in Florida," (3 Stat. at L., p. 654,) should be so construed as to allow the two persons learned in the law, appointed under the latter act, "to act as attorneys for the United States as well as for the Territory" to appear in behalf of the United States in every case presented to the judges under either the act of 1823 or the act of 1834. It may, too, be the proper construction of the acts of 1823 and 1834 that, by implication, they conferred upon the judges the power to establish all needful rules and regulations, not inconsistent with those statutes, in regard to the mode of presenting and conducting cases under them. It seems to have been the practice to present claims under those acts by petition, and that practice is recognized by the very act, under which the case of *United States vs. Ferreira* was instituted, as a method of proceeding already known and established. It uses the language "that *the petition* for the allowance of such claim," and "that said parties shall, respectively, allege in such *petition*."—(9 Stat. at L., p. 788.)

The Supreme Court assign no reason for their opinion that the treaty did not require a judicial proceeding. My reasons for the contrary opinion have already been given. What was said by the Supreme Court on this point, I may be allowed, with the most perfect respect, to say, was a mere *dictum*.

It is no small relief to me in being constrained, by a solemn conviction of duty, to differ from the reasoning of the Supreme Court, to find that on one occasion, at least, that court, with the magnanimity for which it is distinguished, overruled its own solemn decision in reference to another part of the treaty of 1819. I refer to the case of *United States vs. Perchman*, 7 Peters' R., 81, overruling *Foster vs. Neilson*, 2 Peters' R., 253, both of which have already been noticed. Would the decision of the Supreme Court, in the case of *The United States vs.*

reira, have been what it is, if the Spanish part of the treaty had been brought to their view, and the translations which have been furnished me by the counsel on both sides in this case been submitted to them?

The act of 1834 is an act in *pari materia* with the act of 1823, and manifestly declaratory of the latter that it requires but little comment. I have already remarked upon its general features. It will be observed, that, under the act of 1823, the judges were required to judge claims under the treaty, and that, under the act of 1834, the judge of the superior court at St. Augustine was authorized to adjudge claims for losses in 1812 and 1813. The act of 1823, therefore, defines the losses in 1812 and 1813 to be *injuries* under the treaty. This was done by way of explaining the intention of the act of 1823, and of the treaty, in order that future mistakes on that point might be avoided. The treaty did not provide for the satisfaction of *losses*, but for the satisfaction of *injuries*. Losses might have been occasioned by the operations of the troops of the United States, and yet not be injuries; or if they could be justified by the law of nations, they were then *damna absque injuria*. The act of 1834 relieves the claims for losses in 1812 and 1813 from all difficulty on this point, and in effect declares them to be injuries, in the sense of the treaty.

If my construction of the act of 1823 be correct, it is plain that the decisions of the judges, referred to in the first section of the act of 1834, were *judgments* in the technical sense of that term. What, then, was meant by the direction that the Secretary of the Treasury should pay the amount of those judgments in all cases where the decision should be deemed by him to be just? Just with reference to what? There can be no doubt that the term is here used in precisely the same sense in which it was used in the act of 1823, and means *not* within the provisions of the treaty. If the decision was rendered by the proper tribunal, and in a proper case, then it was *just* in the sense of the treaty, and of the act of 1834. It would have been most unjust for Congress to provide in good faith for the establishment of those claims by judicial decisions, and then, in the next breath, wholly to deprive the decisions, thus establishing the claims, of the character and effect of judgments. Such legislation would have been a breach of the treaty. It would have been, in effect, to keep the word of promise to the ear, and break it to the hope. It might have been a literal compliance with the treaty, but it clearly would have been a substantial violation of it.

I have already shown that the act of 1834 makes no provision for the payment of the judgments authorized by its second section, and that they could only be paid under the act of 1823. The present case arose under the second section of the act of 1834. My remarks upon the act of 1823 are therefore applicable to this section.

But the term "awarded" is used in the act of 1834, and the decision of the judge is, in both provisions of the first section of that act, called an "award;" and hence it is inferred that the judges were only commissioners. I respectfully suggest, that the effect of such a construction is to lay too minute a stress on the strict and precise signification of words. The strict and precise signification of words may

be upheld to effectuate the intention of the act, but not to defeat it. We must look to the effect and substance of the matter, and not to every nicety of form or circumstance. It is not, in general, a true line of construction to decide according to the strict letter of the act; but the courts will rather consider what is its fair meaning, and will expound it differently from the letter, in order to preserve the intent. *Qui hæret in litera, hæret in cortice*.—(1 Co. Litt., Thomas's ed., 15; Per Lord Kenyon, C. J., 7 T. R., 196; *Fowler vs. Padget*, Id., 509; 11 Rep., 73; *Vincent vs. Slaymaker*, 12 East. R., 372; 3 Rep., 27.) But the second section of the act of 1834 used the word "adjudge," and this case comes under that section. Judges "adjudge," and commissioners "award." The letter of the law, therefore, is in favor of my construction. It is, too, not an uncommon expression to speak of "awarding a judgment," of the "award of a judgment," and of a "judgment awarded."

If, under a treaty existing antecedently to the treaty of 1819, the injuries occasioned by the troops of the United States to Spanish subjects had been established by judicial decisions, and afterwards by the 9th article of the treaty of 1819, the United States had stipulated to pay the amount of the decisions to the persons in whose favor they were adjudged, and then an act of Congress had been passed to carry the 9th article into effect, in the very words of the second section of the act of 1823, with the exception that the words "shall decide" were substituted by the words "have decided," could there be any doubt as to the meaning then to be given to the words "just and equitable?" If the more enlarged interpretation, which would give to the Secretary of the Treasury the power to revise the decisions, should be put upon those words, then it would be so manifest that the act would be a gross and palpable and inexcusable violation of the treaty, that it would be impossible to believe that Congress could have intended to use them in that sense, whilst they were at the same time, *eodem flatu*, professing to carry the ninth article of the treaty into effect. In the cases of *Talbot vs. Seaman*, 1 Cr. R., 43, and *Murray vs. Schooner Charming Betsy*, 2 Cr. R., 118, the Supreme Court lay it down as a rule, that an act of Congress ought *never* to be construed to violate the law of nations if any other *possible* construction remains. This rule commends itself both by its wisdom and its justice, and it applies much more emphatically to a treaty than to the general principles of the law of nations, for "he who violates his treaties, violates at the same time the law of nations."—(Vattel, B. II, ch. 15, §221.) But how much is its force strengthened, when we come to apply it to a statute *passed expressly to carry a treaty into effect!* Under its influence, in the case supposed, it would not be regarded as a forced construction, to say that the words "just and equitable" should be construed "justly and equitably;" for surely it is no more difficult to convert "just and equitable" into "justly and equitably;" than it is to convert "quantity" into "value," and "value" into "price." Such changes, we have seen, may be made whenever they are necessary to effectuate the intention of the statute.—(Dwarris on Stat., 557; 9 How. R., 619.) Nor would it be considered, in the case supposed, *impossible* to conceive that Congress might have used the words "~~just and equita-~~

le" merely to indicate to the Secretary of the Treasury that, in considering whether a decision was within the provisions of the treaty, we should not be guided by narrow and strictly technical rules, but by the broader principles of justice and equity, so as to carry out the treaty in good faith, and in a liberal and enlarged spirit. Such a construction would satisfy the words of the statute, preserve the public faith, and carry the treaty into effect. Even the construction which we have put upon the words "just and equitable," as they stand in the act of 1823, would be regarded as, at least, *possible*, and *if possible*, under the rule of the Supreme Court, would be adopted; for an act of Congress ought *never* to be construed to violate a treaty if any other *possible* construction remains.

But how does the case supposed differ from the case actually before us? I have already shown, that as soon as the injury was judicially established, the ninth article of the treaty became in effect a stipulation to pay the amount of the judgment, and substantially the same it would have been if the injuries had already been established at the time of making the treaty, and the stipulation had been direct to pay that amount. A promise to pay such a sum as A shall name, becomes a promise to pay the sum named by A as soon as it is named by him. A promise to abide by an award, becomes in effect a promise to pay the amount awarded as soon as the award is made. And so a stipulation in a treaty to make satisfaction for injuries which shall be judicially established, becomes a stipulation to pay the amount of the judgment as soon as it is duly rendered. The only difference, therefore, between the case supposed and the case now before us, is one of time, which in no way affects the principle which I am now considering.

Some stress has been laid on the circumstance that in the act of 1847 the judge is called a commissioner.—(9 Stat. at L., chap. xx, § 6, p. 130.) Upon this point I have but two remarks to make: (1) that it was not competent for Congress, in the year 1847, by an act declaratory of the meaning of the act of 1834, to affect vested rights; and (2) that Congress did not mean to make any such declaration, for the object of the act of 1847, as regards this subject, was not to declare whether the judge acted as a commissioner, or in his judicial character under the act of 1834, but merely to transfer the unfinished business under that act to the judge of the district court of Florida.

It is not at all questioned that the evidence in this case abundantly shows that it was within the jurisdiction of the judge who decided it: that the decision in it was rendered by the judge by whom it purports to have been rendered; and that the injury complained of was occasioned in the years 1812 and 1813, to the petitioner's intestate, who was at that time a Spanish subject, by the troops of the United States in East Florida, before the entrance into that province of the agent and troops of the United States. The decision of the judge, therefore, is just and equitable, within the provisions of the treaty of 1819, and the United States are bound by the faith of treaties, by the laws enacted by Congress to carry the treaty of 1819 into effect, and by the principles of that great moral code which has come down to us from on High, and which neither individuals, nor nations, can ever disregard with impunity, to satisfy it to the uttermost farthing.

My opinion, therefore, is, that the petitioner is entitled to relief.

## NOTE.

The following are the translations referred to in the opinion of SCARBURGH, J.:

## 1. TRANSLATION FURNISHED BY THE SOLICITOR.

*Extract from the treaty with Spain of 1819:*

Y los Estados Unidos satisfarán los perjuicios, si los hubiese habido, que los habitantes y oficiales Españoles justifiquen legalmente haber sufrido por las operaciones del Exército Americano en ellas.

[Translation.]

And the United States shall (or will) satisfy (or make satisfaction) for the injuries, if any there should have been, which the Spanish inhabitants and (Spanish) officers may or shall judicially prove, according to law, that they have suffered (literally to have suffered) by the operations of the American army in them (the Floridas.)

NOTES.—The words *si los hubiese habido* are about as literally translated, I think, by “if any there should have been.” as they could be, preserving their plain meaning at the same time.

I understand the word *Españoles* to apply as well to *habitantes* as to *oficiales*. It seems to have been so understood by the negotiators of the treaty, and the arrangement of the words favors that idea, I think. *Oficiales Españoles* means Spanish officers, not officers of Spain; and in this case there might be a difference as well as a distinction. If the word was *España*, instead of *Españoles*, then it would not refer to *habitantes* without changing the phraseology of the sentence.

The words *justifiquen legalmente* are accurately translated, in my opinion, by “may judicially prove, according to law.” *Justificar-justum facere* is a verb that has a good many meanings. When it is used as a law term, as it is in this clause of the treaty, it signifies *that*, or something equivalent. The translation might be varied, and the meaning still preserved; but, to be correct, it must convey the idea that the injuries (named in the treaty) are to be proved by judicial proceedings of some kind, conducted in legal manner and form—*legalmente*. Escriche says, in his Spanish Law Dictionary, that the word *justificación* means the proving of something by documents or witnesses; and *justificar* means, in Spanish law, to produce judicially written or oral proof of a thing.

## TRANSLATION FURNISHED BY THE COUNSEL FOR THE PETITIONER.

[ los Estados Unidos satisfarán los perjuicios, si los hubiese  
 d the United States will satisfy the injuries, if them there have  
 ido, que los habitantes y oficiales Españoles justifiquen\*  
 n, which the inhabitants and officers of Spain may judicially prove  
 almente haber sufrido por las operaciones del Exército  
 ording to law to have suffered by the operations of the 'army  
 ericano en ellas.  
 erican in them, (the Floridas.)

NOTE.—This translation is made word for word, as being more satis-  
 tory.

Justifiquen is translated "may *judicially* prove." It is the subjunctive present of the verb  
*probar*. This verb is translated into Latin by the Spanish Academy, "in *jure, judicio,*  
*re,*" and is explained, in Spanish, by the same Academy, as follows :

Probar judicialmente alguna cosa."

to prove judicially any thing.

see Dictionary of Spanish Academy, verb JUSTIFICAR.)

## IN THE UNITED STATES COURT OF CLAIMS.

LETITIA HUMPHREYS, Administratrix of the estate of Andrew Atkinson, deceased,	} <i>Petitioner's Brief.</i> On Re-hearing.
<i>vs.</i> THE UNITED STATES.	

## I.

The 9th article of the treaty requires the injuries for which it stipu-  
 s satisfaction to be *judicially* established ; and binds the United  
 tes to satisfy, by payment, such and such *only* as shall be so estab-  
 ed.

The English version is as follows :

'The United States will cause satisfaction to be made for the inju-  
 , if any, which, by process of law, shall be established to have been  
 red by the Spanish officers and individual Spanish inhabitants by  
 late operations of the American army in Florida.'

The Spanish version, as follows :

'Y los Estados Unidos satisfarán los perjuicios, si los hubiese habido,  
 los habitantes y oficiales Españoles justifiquen legalmente haber  
 ido por las operaciones del Exército Americano en ellas.'

The English side of the treaty requires the injuries to be established  
 y process of law," which are the precise technical words of the

common law, to signify a judicial proceeding. These words were, undoubtedly, borrowed from the common law, to signify a judicial proceeding which was to take place under our own municipal laws, and before our own courts or judges, and must, by a well-established rule of construction, be referred to that code for their meaning.—(3 Wash. C. C. Rep. 209, *Smith vs. Jones* ; 1 Wash. C. C. Rep., p. 56, *Hurst vs. Hurst*, and authorities generally.

But all doubt on this point is now removed by the translation of the Spanish side of the treaty, recently obtained at the instance of his honor Judge Scarburgh. The equivalent words in the Spanish are, by that translation, “ shall *judicially* prove according to law.”

The translator on the part of the government says : “ The translation might be varied, and the meaning still preserved ; but to be correct, it must convey the idea that the injuries (named in the treaty) are to be proved by *judicial proceedings* of some kind.”—(For translations, see Appendix, No. 1.)

In the case of the *United States vs. Perchman*, (7 Peters, 51.) in commenting on the English and Spanish parts of the 8th article of the same treaty, Chief Justice Marshall said :

“ The treaty was drawn up in the Spanish as well as in the English languages. Both are *originals*, and were undoubtedly intended by the parties to be identical, \* \* If the English and Spanish parts can, without violence, be made to agree, that construction which establishes this conformity ought to prevail.”

Instead of violence, to produce conformity, it would seem to require little short of violence to produce diversity of meaning between the English and Spanish parts of the 9th article, as to the *mode* in which the injuries are to be established.

It is thus placed beyond all possible doubt, that the treaty required the injuries to be “ established” by a “ *judicial proceeding*.”

It is equally clear that the United States stands solemnly bound, by this treaty, to make satisfaction for such injuries as shall be so established.

The manner or *mode* in which the injuries were to be “ established” is thus distinctly agreed in the treaty itself, and becomes an essential part of it, and necessarily excludes all other modes, either to bind the United States, or to fulfil its treaty obligation to the claimant or to Spain. This provision is peculiar, and is found in none of our other treaties ; it is rendered more peculiar and striking when contrasted with that which immediately follows it in the 11th article of the same treaty, for ascertaining the claims of our own citizens upon Spain, for like injuries in violation of the law of nations, which are to be established by a board of commissioners in the usual manner.

This striking contrast, as to the *mode* of establishing similar claims, under the same treaty, clearly indicates a distinct object in the minds of the high contracting parties, and cannot be overlooked or disregarded.

The important fact, then, that the treaty expressly requires the injuries to be established *judicially*, must be *distinctly borne in mind* in the construction of the acts of Congress passed to carry it into effect ; and every construction of these acts, founded upon the idea that the

reaty did not require the claims to be judicially established, or that they could be established, as the treaty required, by an ordinary board of commissioners—like that called for by the 11th article—or by any executive officer, must be entirely abandoned. The entire certainty on this point, which results from the recent translation of the Spanish side of the treaty, presents the case in a light in which it has never been decided.

2. The Secretary of the Treasury could not act *judicially* under the acts passed to carry the 9th article of the said treaty into effect. He acted as an *executive* officer, under his appointment, commission, and oath as Secretary of the Treasury, and in that capacity in which he was authorized to pay money out of the Treasury. He had never been appointed, commissioned, or sworn in any other capacity, and if he did not act in that, he was not constitutionally authorized to act at all.—(Constitution of the United States, article 2, section 2.)

In the case of *Martin vs. Hunter's Lessee*, the Supreme Court of the United States said :

“The object of the Constitution was to establish three great departments of government—the legislative, the executive, and the judicial departments. The first to pass laws, the second to approve and execute them, and the third to expound and enforce them.”—(1 Wheaton, 54.) This court laid down the same doctrine in the case of *Magruder*.

In the same case the Supreme Court further said :

“Congress cannot vest any portion of the judicial power of the United States except in courts ordained and established by itself.”—*Ib.*, Constitution of the U. S., art. 3.) That “nothing, therefore, is more to be avoided in a free constitution, than uniting the provinces of a judge and a minister of state.”—(See 1 Black. Com. 269.)

No one has ever expressed the opinion that the Secretary of the Treasury acted *judicially* under the acts passed to carry the 9th article of the Florida treaty into effect.

In the case of *Beatty's Executor* this court decided, that “no part of the *judicial power*, under the Constitution of the United States, can be conferred upon an executive officer.” And in the case of *Sturgess, Bennett & Co.*, where an act of Congress authorized the Secretary of the Treasury to refund money paid by importers “whenever it should be *shown to his satisfaction*” that it had been illegally exacted, this court decided “that the power which it (the act) confers upon the Secretary of the Treasury is *purely administrative*, and in no sense *judicial*.” And this court further said in the same case, that “it would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights, and unsupported by law, should afford no ground for legal redress.” That “it (the law) did not vest the Secretary of the Treasury with the power to decide upon the *rights* of the claimant, except to the extent that he might be required to act upon them.” And this court further said in that case, that it was “no answer to this view, that in such a case the party was without remedy, except by an appeal to the legislative department of the government; for if that were



sufficient, then there would be but few cases of contract of which this court could take cognizance."

The power vested in the Secretary of the Treasury by the act of 3d March, 1839, with reference to which this decision was made, namely, to pay "whenever it should be shown *to his satisfaction*, &c.," was the same power conferred upon him by the act of 3d March, 1823, to carry into effect the 9th article of the Florida treaty.

The principle thus laid down by this court was fully confirmed on a re-argument of the case.

As the Secretary of the Treasury did not and could not act judicially under the acts passed to carry the treaty into effect, he could not establish the injuries *judicially* as the treaty required.

3. The acts of 1823 and 1834 were intended by Congress to carry the treaty into full and complete effect. This is understood to be fully conceded by this court on the 3d page of the opinion, where it says, that "the acts of 1823 and 1834 must be considered as if their provisions were contained in the same act. The object of both acts is the same, namely, to furnish an *appropriate remedy* by which the injuries mentioned in the last clause of the ninth article of the treaty aforesaid *might be established*, and *the satisfaction there alluded to be obtained*."

The act of 1823 is entitled "An act to carry into effect the ninth article of the treaty," &c.; and it provides for the establishment of the injuries by the judges "agreeably to the provisions of the ninth article of the *treaty* with Spain;" and for their payment by the Secretary of the Treasury when just and equitable "within the provisions of the said *treaty*." The *treaty*, therefore, is thus expressly made by Congress the absolute statutory rule both to the judge and Secretary, and must govern every body in the construction and execution of the acts of Congress. In other words, "the provisions of the *treaty*" are converted into *statute law* by Congress, and made the only guide of every body called to execute the acts. There is no law but the *treaty*, the *treaty* and acts being made one by Congress. We are not at liberty to construe the acts independently of the *treaty*. To attempt to do so will be a clear violation of the express provisions of the acts. Our first duty, therefore, like that of the judge and Secretary when acting under these laws, is to go to the *treaty* for the meaning and true construction of the acts. Whatever the *treaty* requires, the acts expressly require; whatever the *treaty* promises, the acts expressly direct; whatever the *treaty* requires to be done by the judges in the establishment of the claims, and by the Secretary in their payment, the acts expressly direct; whatever is inconsistent with the requirements of the *treaty*, the acts expressly forbid.

It was therefore the clear and undoubted purpose of the acts to carry the *treaty* into full and complete effect.

4. The power to adjust, adjudge, and adjudicate the claims, *i. e.*, to "establish" the injuries, "agreeably to the provisions of the *treaty*," is, by the acts, conferred, expressly and exclusively, on the *judge*; and no part of this power is conferred on the Secretary of the Treasury.

This power was conferred by the 1st section of the act of March 3,

1823, which was entitled "An act to carry into effect the ninth article of the treaty concluded between the United States and Spain, the twenty-second day of February, one thousand eight hundred and nineteen," and is in the following words:

"Sec. 1. That the judges of the superior courts established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed to receive and adjust all claims arising within their respective jurisdictions, of the inhabitants of said Territory, or their representatives, agreeably to the provisions of the ninth article of the treaty with Spain, by which the said Territory was ceded to the United States."

This is the only provision for the establishment of the claims enacted by Congress, when they first legislated to carry the treaty into effect; and it will be observed that the Secretary of the Treasury is not named in the section.

The 2d section of the explanatory act of the 26th June, 1834, which this court declares must be taken in connexion with the foregoing provision, declares, "That the judge of the superior court of St. Augustine be, and he hereby is, authorized to receive, examine, and adjudicate all cases of claims for losses occasioned by the troops aforesaid, in 1812 and 1813," &c.

And the act of the 3d March, 1849, for the relief of certain persons who had failed to file their claims in time, provides, "That the judge of the district court of the United States for the northern district of Florida be, and he is hereby, authorized and directed to receive and adjudicate the claim of Peter Capella, administrator of Andrew Capella," &c.

In none of these acts is the Secretary of the Treasury named in connexion with the authority to adjust, adjudge, or adjudicate the said claims. That authority is conferred solely upon the judges: so that, whether the judges acted in their judicial capacity as judges, or as commissioners, the power and authority to establish the claims "agreeably to the provisions of the treaty" is conferred solely upon them.

5. The power and authority conferred upon the Secretary of the Treasury by the said acts is, expressly and exclusively, confined to the payment of the injuries which shall have been established by the judge; and whatever discretion is conferred upon him by the acts, is to be exercised with express reference to that single question, and not with any reference whatever to the establishment of the claims under the treaty. His authority is derived from the 2d section of the said act of March 3, 1823, which is in the following words:

"Sec. 2. That in all cases in which said judge shall decide in favor of the claimants, the decisions with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the said treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged, out of any money in the treasury not otherwise appropriated. Approved, March 3, 1823."

The 1st section of this act had expressly provided for the establishment of the claims "agreeably to the provisions of the treaty," by the

judges, who could act judicially, as the treaty required ; and this 2d section, it will be observed, simply provides for the payment, not of the Secretary's own decisions, but of the decisions made by the judge. Any discretion he is authorized to exercise, and any use he is to make of the evidence which is to be reported to him, has reference solely to the question of the *payment* of the decision of the judge. When he pays, he is to pay the decision of the judge ; and the act expressly declares, without any exception, qualification, or discretion, that he "*shall pay the amount thereof*," *i. e.*, of the judge's decision. If he refuses to pay, it is a mere *negative act* of declining to pay, and certainly is not an *establishment* of the claim. A refusal to pay a decree of the judge cannot, with any propriety, be denominated an establishment of a claim.

Again: None but the decisions "*in favor* of the claimants" are to be reported to the Secretary of the Treasury. The adverse decisions of the judge are not to be even reported to him, nor is the evidence taken in support of claims rejected by the judge, to be reported to the Secretary. Nor can he increase the amount of a decree made by the judge in favor of a claimant, even where the evidence reported to him with such decree shows that the amount awarded is too small.—(See Secretary Woodbury's letter to Judge Reed, dated Oct. 7, 1838, Appendix No. 2.) The reason of this is, that the Secretary's power is confined exclusively to the payment of claims, (established by the judge,) in his executive capacity of Secretary of the Treasury, whilst both the treaty and the acts, passed to carry into effect, expressly require the claims to be established judicially, in which capacity he could not, constitutionally, act, and was not authorized or required to act.

The unparalleled injustice and absurdity of so construing the plain provisions of the above recited act, as to make decisions of the judge *final* when *against* claimants, and of no validity when *in his favor* ; and of making the United States take *two chances* for the rejection of claims to one in their favor, and that where a faithful fulfilment of a treaty stipulation was committed to their honor and good faith, will be more particularly noticed hereafter.

6. The acts passed to carry the treaty into effect require precisely what the treaty requires. (This is fully shown under head 1, and 3d point of this brief, which see ante.)

There is no foundation whatever for the idea that the *acts* can be properly executed without a full execution of the *treaty* ; and none for the idea that the acts call for anything different from the treaty.

7. To construe the *acts*, and to decide whether they have been properly executed, it becomes necessary, in the first instance, to construe the *treaty* and to ascertain what it calls for ; because the acts expressly call for the full execution of the treaty, and we cannot know what that is, without first construing the treaty and deciding what it calls for. When we have thus ascertained what the treaty calls for, we have the *key* which Congress has expressly given to us for the construction of the acts passed to carry it into effect.

## II.

Having ascertained from the clear and undoubted provisions of the treaty, and of the acts passed to carry the treaty into effect—

1. That the claims are required to be judicially established ;
2. That the Secretary of the Treasury cannot so establish them ;
3. That the acts were intended to carry the treaty into full and complete effect ;
4. That the power to establish the claims as the treaty requires, is, by the acts, vested solely in the judges ;
5. That all the power and discretion of the Secretary is expressly confined, by the acts, to the *payment* of the claims, and that he has no authority to establish them, because he could not act judicially ;
6. That the acts require precisely what the treaty requires ;
7. And that the *treaty* is the *key* to the proper construction of the *acts*, and that the acts require us first to construe the treaty in order to place a proper construction upon the acts passed to carry it into effect :

Let us see in what capacity the judges and the Secretary of the Treasury, respectively, acted ; and the legal effect of their respective acts.

1. In deciding in what character the judges acted, it must be distinctly borne in mind, 1st, That the treaty required the claims to be *judicially established* ; 2d, That the acts required the judges to adjust and adjudge the claims "*agreeably to the provisions of the treaty* ;" 3d, That the acts were intended by Congress to carry the treaty *into full effect*.

The "superior courts at St. Augustine and Pensacola" consisted each of a single judge. The judges had been appointed by the President and Senate, as the Constitution requires, and commissioned and sworn, and legal and territorial jurisdictions, respectively, assigned to them *as judges*. They had not been appointed, commissioned, or qualified to act, nor had any kind of jurisdiction been conferred upon them in any other capacity than as judges. As judges of the said superior courts they were each authorized to "exercise the same jurisdiction within its limits in *all cases arising under the laws and Constitution of the United States*," which was vested in the court of the Kentucky district, by the judicial acts of September 24, 1789, and March 3, 1793.—(1 Stat. at Large, 73, 333.)

The court of the Kentucky district possessed all the powers and jurisdiction of a district and circuit court of the United States. It also had "*exclusive original cognizance of all seizures on land \* \* \* under the laws of the United States ;*" \* \* \* also "*of all causes where an alien sues for a tort only in violation of the law of nations, or treaty with the United States.*" "Special courts" were also to be held, "*in the discretion of the judge.*"—(Sections 2, 3, 9, and 10 of judicial act of September 24, 1789 ; 1 Stat. at Large, 73, 74, 77.)

By the acts of March 30, 1822, and of March 3, 1823, (the same by the first act to carry the Florida treaty into effect was passed,)

the *same jurisdiction* was conferred upon the judges of the superior courts in Florida; and it was the precise jurisdiction which was necessary to execute the 9th article of the Florida treaty. *Torts only in violation of the law of nations and of a treaty of the United States*, (to wit, the treaty of 1795 with Spain, which had been violated by the invasion of Florida in 1812 and 1813,) were to be redressed; and the 9th article of the treaty of 1819 had stipulated that they should be "judicially" established. No other tribunal, accessible to the claimants, existed, in which the injuries could be judicially established as the treaty required.

By the act of 1823, the judges of these "superior courts, *established at St. Augustine and Pensacola, respectively*," were, "within their respective jurisdictions," authorized and directed to receive and adjust these claims; and the amount of their decisions was to be paid to the persons in whose favor the same was "adjudged."

The authority, it is said, was conferred upon the "*judges respectively \* \* \** within their respective jurisdictions," but not upon the court, *eo nomine*, and hence it has been inferred that the authority was not to be exercised judicially.

To this it is answered, that if the judges were not authorized to act judicially, they were not authorized to act at all, because they had never been appointed, commissioned, or sworn in any other capacity; and they could not act without constitutional appointment. They were to act "within their respective jurisdictions;" but they had no jurisdictions, except in their official capacity as judges of the superior courts. Where courts consist of a *single judge*, they are indiscriminately denominated in the laws of the United States as "*the court*," or "*the judge of the court*;" both phrases meaning precisely the same thing. For example, jurisdiction was conferred upon the same judges of the superior courts of Florida to adjudicate the land claims, under the 8th article of the same treaty, with an appeal to the supreme court, where the duty to be performed was conceded to be judicial. The language was, that the said land claims "shall be received and adjudicated by the *judge of the superior court* of the district in which the land lies, upon the petition of the claimant," &c.—(Act of May 23, 1828, Stat. at Large, p. —, sec. 6: 8 Peters, 466, *United States vs. Clarke*.) Another example may be seen in the Pension act of March 23, 1792, which requires the "circuit courts," (being composed of more than one judge,) and "the *judges* of the district courts," (being each composed of one judge,) to perform certain duties.—(1 Stat. at Large, 243, sections 2 and 3.) The 3d section of the Judiciary act of 1789 declares as follows: "And there shall be a court called a district court in each of the aforementioned districts, to consist of *one judge*, who shall reside in the district for which he is appointed, and *shall be called a district judge*," &c.—(1 Stat. at Large, 73.)

Section 33 of the said Judiciary act of 1789 authorizes "any justice or *judge* of the United States to arrest, imprison, or bail, for offences against the United States."—(1 Stat. at Large, 91.)

Many other examples might be given where a judge, by the name and designation of judge, without denominating him the judge of any

articular court, is authorized to perform acts clearly of a judicial character. A number of such examples will be hereafter cited where the Supreme Court of the United States has decided their acts to be judicial.

Again, by the said 1st section of the act of 1823, the judges are authorized and required to receive and "*adjust*" all claims "arising within their respective jurisdictions," &c. ; and though the word "*adjust*" is used as synonymous with "*adjudge*" and "*adjudicate*" in the same and in subsequent acts, it has been supposed that the term indicates that the action of the judge is not intended by Congress to be judicial.

The following citation from the 2d volume of Woodeson's Lectures, p. 421, sec. 34, will show that a more appropriate term could not have been used to designate the judgment of a court sitting under the law of nations :

"The *law of nations* is adopted and appealed to by civilized States as the criterion for *adjusting* all controversies proper to be so decided. This is the rule by which the property of captures at sea is determined, more especially where the subjects of independent powers are interested in the *litigation*. In such cases, neither the customs of the British Admiralty, nor British acts of Parliament, can as such be of sufficient authority and avail. But the *law of nations* is a part of the laws of England."

For the high authority of this author upon questions arising under the law of nations see the argument of Chief Justice Marshall in the case of Jonathan Robbins, 5 Wheaton, Appendix 1.

In explaining and defining terms used in the acts of Congress passed to carry the 9th article of the Florida treaty into effect, which have been supposed to militate against the judicial character of the action of the judge, it may not be inappropriate to remark, that the weight given to the word "*award*," used in the act of 1834 to designate the decision of the judge, as tending to show that the action of the judge was not judicial, is founded on an entire misconception of its legal meaning. That term is an appropriate one to describe the judgment or sentence of a court, as well as the decision of mere arbitrators or commissioners. It is the appropriate term to designate the sentence of a court of admiralty sitting under the law of nations in cases of illegal seizures or captures, to which the proceedings before the Florida judges bore the most direct analogy. All the English dictionaries give as one of its meanings that which I have stated. In Johnson's Dictionary it is defined as follows : "*Award*—Judgment, sentence, determination."

"*To award*—To adjudge, to give anything by a *judicial sentence*."

Dr. Anthon, (the very highest authority,) in his "*Latin-English and English-Latin Dictionary*," defines this term as follows : "*Award, substantive*—*Judicium, arbitrium, decretum, sententia, litis adjudicatio*." He defines *Judicium*, its first meaning, as follows : *Judicium, i. e. a legal trial, a judicial inquiry*."

For the same purpose, notice has been taken of the fact that the judge in his report to the Treasury Department in this case, added to his proper signature the words "*Judge and Com'r*," (meaning judge and commissioner.) It would probably be bestowing all the consid-

ration this fact deserves, to cite the maxim, "*Utile, per inutile, non vitatur.*" A few words of explanation, however, will fully illustrate this unnecessary and unauthorized *addenda*. It was not added to the legitimate word "judge" until the act of 3d March, 1839, cut off certain extra allowance of pay which had been made to the judges for the extraordinary and unusual judicial service required in deciding these claims and the land claims, under the 8th and 9th articles of the Florida treaty. That act cut off all extra pay to officers, including judges as well as others, "whose salary or whose pay or emoluments is or are fixed by law." The salary of the "judge of the superior court established at St. Augustine," *as a judge*, was "fixed by law." If he had been a *commissioner* to decide claims under the 9th article of the Florida treaty—as no pay of any such officer had ever been "fixed by law," because no such officer had ever been appointed or contemplated—the act of 1839 would not have affected him. In this exigency, the judge contended, that because he decided the *facts* as well as the *law* in the cases arising under the 9th article of the treaty, he was not merely a judge whose sole duty it was, he contended, to decide questions of *law* alone; and that as he also decided the *facts* in these cases, he was a *commissioner* as well as a judge; and on this ground he demanded a continuance of his extra pay, which the Secretary had refused to continue, after the passage of the act of 1839, and this superfluous *addenda* was added to back up the claim.

In 1840 the question of law involved in this pretension, that the judge acted as a commissioner *as well as a judge*—for it was never pretended he did not also act as a judge—was submitted by Secretary Woodbury to the Attorney General for his opinion thereon. That opinion was given on the 21st of October, 1840, and will be found at pp. 1361, 1362, old opinions of the Attorneys General. The opinion was, that in performing his duties under the acts of 1823 and 1834, the judge acted under his judicial salary, (and of course in his judicial capacity, which was all that salary covered and compensated,) and that the act of 1839 deprived him of extra pay for that duty. This decision was fully approved by the Secretary, as it had been previously announced to Judge Reid by him.

This quibble of the Florida judge, for the purpose of increasing the salary affixed to his office by law, cannot affect the legal rights of the claimants under his adjudications.

Judge Bronson, of the district court of the United States for the northern district of Florida, in the case of Ferreira, went fully into the character in which the judges acted in adjudicating these claims; and he affixed his full official signature to his decrees and reports in these cases, as will be seen by his decision in that case.

In Pilkington's case, before the privy council, reported in 2 Knapp's Reps., p. 31, Sir James McIntosh said that in acting on cases arising under a treaty, that court was "*a court of the law of nations*;" and added, that "although unhappily for mankind, that law is destitute both of precision and power, and those who ought to be its subjects are powerful and rebellious, yet, as an important compensation for these great defects, it is at least free from all pettifoggery and chicanery;

very discussion on it must refer to the substantial justice and natural equity of the case."

Vattel admonishes those who deal with the treaty faith of nations against "quibbles on words," which he says "only serve to aggravate the crime of perfidy."—(B. 2, chap. 17, sec. 269, 273.)

Though the treaty did not create a tribunal to establish the claims under the 9th article thereof, yet, as it stipulated for a *judicial establishment of the claims*, all other tribunals except a judicial one were distinctly excluded as if they had been expressly excluded by the positive provisions of the treaty; and a *judicial tribunal* to establish them was as clearly provided for as if some particular judicial tribunal had been named in the treaty, as a board of commissioners was named in the 11th article. The United States, therefore, was not left free to establish any tribunal it pleased, or any tribunal but a judicial one. They might refuse to execute the treaty; or they might create a tribunal different from that promised; but a refusal to execute the treaty could not be set up as a fulfilment of it; nor could the action or decision of a tribunal different from that required by the treaty be claimed to be a fulfilment of the treaty stipulation; nor could the attribute of *finality* be ascribed to its decisions any more than it could to the decisions of an executive officer, if one had been substituted for the board of commissioners provided for by the 11th article of the treaty. The *treaty tribunal*, under the 11th article, was a board of commissioners; and the only tribunal that can be considered a *treaty tribunal* under the 9th article must be a *judicial* tribunal of some kind. None other can fulfil the treaty stipulation for a judicial establishment of the claims. A tribunal totally different from that provided for by the treaty cannot, in any just sense, or with any semblance of good faith, be considered a treaty tribunal. A treaty tribunal must be one created in conformity to, and of the character provided for by the treaty, and not one created in violation of the treaty.

The 9th article of the Florida treaty stipulated for a judicial establishment of the claims in question, and bound the United States to pay what should be so established; and they cannot substitute the decisions of an executive for those of a judicial officer without a most palpable violation of the treaty.

The nature of the duty to be performed—that of establishing the amount and measure of damages to which the claimants are entitled for injuries to property, as in actions of trespass, or libels in admiralty for seizures of property in violation of the law of nations—is strictly judicial; and this is fully admitted by the Supreme Court.

When duties, in *their nature judicial*, are performed by persons holding a *judicial office*, the act is judicial. When duties, in *their nature judicial*, are performed by persons who do not hold a *judicial office*, as arbitrators or commissioners, the act is not judicial. This is the plain distinction between acts which are judicial, and those which are not. In other words, if the person performing the duty is not clothed with the *judicial office*, or if the duty to be performed is not of a *judicial nature*, in either case the act is not judicial.

The judicial character of the act does not depend upon its being performed *in open court*, and with all the formalities usually attending



judicial proceedings, formally conducted in open court. The 9th article of the Florida treaty does not, necessarily, call for such a formal judicial proceeding. The nature of the duty to be performed being judicial, the treaty provided for a judicial establishment of the claims; and the acts of Congress, accordingly, provided for the performance of the duty by judicial officers (and the only judicial officers) possessing a plenary jurisdiction of the matters to be decided. The mode of proceeding was appropriate to the parties and to the nature of the duty to be performed, and is fully sustained by judicial precedents. The proceeding was authorized by the United States, in its own courts or before its own judges, and was, in its nature, like a proceeding upon a petition of right.—(*Massachusetts vs. Rhode Island*, 12 Peters, 750, 751.) It was for the United States to appear and contest, or not, as it saw fit. The form of proceeding was regulated, as far as it saw fit to regulate it; and so far as it was not regulated by statute, the judge was left to mould the proceeding, under the authority given to him to prescribe rules for its government, and by the common law.

“Whenever the provision of a statute is general, everything which is necessary to make such provision effectual is supplied by the common law.”—(Dwarris, 662, and authorities there cited.)

The original jurisdiction of the Supreme Court has never been regulated by law; but the court has been left to prescribe its own mode of proceeding.—(17 How. 492; see 1 Paine's C. C. R.; Appendix, p. 1.)

Numberless duties, prescribed by law to judges, will occur to the mind of every lawyer and judge, where the mode of proceeding is not prescribed; but the acts, when performed, are judicial.

“The *Exchequer* holds sittings for equity business *out of term*: at which also a matter relating to the revenue may be discussed.”—(1 Woodeson's Lectures, 120.)

The court of equity transacts much of its business out of term at chambers.

The court of admiralty is *always open* for the transaction of business, though it is *not a court of record*, (1 Woodeson's Lectures, 139;) and may *fine for contempt*. This the Florida judges could undoubtedly do; and it is an acknowledged test of judicial power.

The question as to the character in which judges or judicial magistrates act, in the performance of duties necessary to carry treaties into effect, is not a new one.

Under the 9th article of the consular convention between the United States and France, “the consuls and vice-consuls” of France were authorized to cause deserters to be arrested and delivered up. “For which purpose (it was provided) the said consuls and vice-consuls shall address themselves to the courts, *judges*, and officers competent, and shall demand the said deserters in writing, proving, by an exhibition of the register of the vessel or ship's roll, that those men were part of the said crew,” &c.

A vice-consul made an application to a judge of the district court of the United States, who, for reasons alleged, refused to issue a warrant of arrest on the evidence produced. A motion was made by the Attorney General for a mandamus to compel the said district judge to issue his warrant; and the question was, in what capacity the district judge

ted under this treaty provision. After a very elaborate argument the Attorney General, in favor of the mandamus, the Supreme Court pronounced the following unanimous opinion, viz :

"BY THE COURT: We are clearly and unanimously of opinion, that a mandamus ought not to issue. It is evident the district judge was acting in a *judicial capacity* when he determined that the evidence was not sufficient to authorize his issuing a warrant for apprehending Capt. Borre."—(3 Dall. 53.)

In this case the district judge was acting under the provision of the treaty, without any legislative act to authorize him to act. The duty performed by the judge was not performed in open court, but in vacation, and at chambers: and was performed under a treaty, and without any act of Congress requiring the judge to act; and yet it was held unanimously by the Supreme Court to be a *judicial act*.

Under the convention with France of the 9th November, 1843, for the mutual surrender of certain persons charged with crimes, which contained no provision for an application to the *courts, judges, or magistrates*, for the surrender of such criminals, and where the district judge had acted *without the authority of any act of Congress*, at the instance of the Executive, the convention having provided that "on the part of the government of the United States the surrender shall be made only by the authority of the Executive thereof:" and "where the district judge, at his chambers, decided there was sufficient cause for the surrender of a person claimed by the French government;" the Supreme Court decided, unanimously, that the Executive had properly referred the question of the surrender of the person claimed to the judge; and that "whether the crime charged is sufficiently proved, and comes within the treaty, are matters for *judicial decision*;" and the court say, the question was very properly "referred to the judgment of a *judicial officer*."—(5 How. 188, 189.) The court further say, that "the mode adopted by the Executive in the present case seems to be the proper one. Under the provisions of the Constitution, the treaty is the supreme law of the land, and, in regard to the rights and responsibilities growing out of it, may become a subject of *judicial cognizance*."

If the action of the district judge in this case was judicial, where the judge acted at chambers, and where there was no law requiring him to act, *a fortiori*, the action of the judges under the acts of 1823 and 1834 is judicial, where the acts of Congress require them to act in fulfilment of a treaty stipulation, and where the duty is strictly judicial.

The only question which has arisen in this class of cases arising under treaties has been, how far the judges were authorized to act under the provisions of the treaty as the supreme law of the land, or at the request of the Executive, without the authority of an act of Congress, and where the treaty contained no provision for the action of the judges. No doubt has ever been expressed, (except in the case of Ferreira, where the real question was merely whether an appeal lay in such cases to the Supreme Court,) that where a duty, judicial in its nature, in execution of a *treaty*, was devolved upon a court or judge, the action of such court or judge was judicial.

The act of the 12th of August, 1842, for carrying our extradition treaties into effect, authorizes "*any* of the justices of the Supreme Court, or judges of the several district courts of the United States, and the judges of the several State courts," "*severally*," to act in extradition cases. Now, if the justices of the Supreme Court were to act in such cases is there any doubt that their action would be *judicial*? And if it would be, why should not that of the Florida judges be judicial?

The decision of the Supreme Court in the case of Ferreira, (13 How., 40,) was that an appeal did not lie in that case to the Supreme Court, and was strictly correct; but the reasoning of the court was founded on a series of errors in fact, which deprives that reasoning of all authority, and makes the case then decided *totally different* from that now presented for decision.

The reasoning of the court was based on Hayburn's case, (3 Dal., 410,) and on the *extra-judicial* opinions contained in the note to that case. The decision in that case assumed that the decision in Hayburn's case had settled a principle, but *no decision was ever made in that case*.—(See Appendix, No. 3.)

That decision also assumed that the pension act of 1792, and the act of 3d March, 1823, for executing the Florida treaty, were alike in principle, whereas they are totally different in principle. The power of revision by the Secretary, and by Congress, is expressly given under the act of 1792, and only by construction and inference under the act of 1823.

The decision assumed that a majority of the judges were of opinion that under the act of 1792 they could act as commissioners, which was an entire mistake.

It also assumed that the question whether the judges could act as *commissioners* under that act had never been decided by the Supreme Court; whereas that court decided unanimously, in 1794, that the judges could not act as commissioners under that act.

The opinion also assumed that the executive and legislative departments of the government concurred in opinion that the court could not act *judicially* under that act; whereas the executive, legislative, and judicial branches of the government held that the judges could not act as commissioners, and that their action in that character was without authority and void.—(See Appendix, No. 3.)

It was assumed by the Supreme Court, and has been assumed by this court, upon its authority, that the act of 1792 only conferred authority to act upon the "circuit court," and not upon the judges, by the name of *judges*.

This is an entire *mistake of fact*. The third section of the act expressly conferred the same authority upon *the judges of the district court* in those districts where no circuit courts were directed to be holden.—(1 Stats. at L., 243, 244.)

And it has recently been discovered that, after the Supreme Court and Congress had decided the action of the judges as *commissioners* to be unauthorized and void, the decisions of the district judge of Maine, *acting judicially*, were recognized as valid, and paid as *legal adjudications*.—(See Appendix, No. 4.)

The whole foundation on which the opinion of the Supreme Court rested has been entirely removed by the establishment of a *different state of facts and law* from that assumed by the court. The authorities upon which it was decided are entirely different from what the court supposed. The note appended to the case "by the order of the court" retracts everything substantially, except the assumption that if the judges had been named *as judges*, as they were in the Florida acts to carry the ninth article of the treaty into effect, they could have acted as commissioners. It is now shown that they were also mistaken on that point—that the district judges were so named, and that they acted *judicially*, and that their action was recognized as judicial and valid.

Ram on legal judgment says that the authority of a precedent is destroyed when it can be said that "it is a decision in giving which the court was misled by a case of no weight, but on which it grounded its decision; \* \* \* if that case *ought to have no weight*, then little attention is due to the decision founded on such authority." (P. 183, cites 2 Bingham, 292, 297, 303.)

Such is the decision in Hayburn's case, and the extra-judicial letters in the note thereof, on which the reasoning of Judge Taney was founded in dismissing Ferreira's case *for want of jurisdiction*. The jurisdiction of the Supreme Court in that case did not depend on the fact whether the judge acted as judge or commissioner; if the judge had been conceded to have acted *judicially*, the Supreme Court would have possessed no appellate jurisdiction, because, 1, none was given by law, and it could only exercise such jurisdiction where it is affirmatively given by law; 2, because such jurisdiction was *necessarily excluded* by the direction to report the favorable decisions directly to the Secretary of the Treasury for payment.

To show that the reasoning of Judge Taney is founded in error and misapprehension, it should seem to be sufficient to state the fact that Judge Story, in his careful Commentaries on the Constitution, cites the same authorities cited by Judge Taney to show that the judges *could not act as commissioners*. He says:

"Sec. 1777, (2 vol., p. 256.) The functions of the judges of the courts of the United States are *strictly and exclusively judicial*. They cannot, therefore, be called upon to advise the President in any executive measures, or to give extra-judicial interpretations of law, or to act *as commissioners* in cases of *pensions* or other like proceedings." He cites, "5 Marshall's Life of Washington, ch. 6, pp. 433, 441; Seargt. on Const., ch. 29, p. 636. (2d ed. ch. 31, p. 375;) Marbury and Madison, 1 Cranch, 171; Dewhurst vs. Coulthart, 3 Dall. R. 409; Hayburn's case, 2 Dall. 409, 410, and note, ib., and p. 411; Seargt. on Const., ch. 33, p. 391, (ch. 34, p. 401, 2d edition," to show that the Florida judge did act judicially, and that his action in that capacity was fully recognized by the Secretary of the Treasury, Mr. Woodbury; and that the judge shaped his proceedings to conform to the wishes and advice of the said Secretary.—(See Appendix, Nos. 5 and No. 6.)

As to the supposed objection, that there was "no suit," there was a petition filed in every case in the nature of a petition in chancery.

The act of 1849 expressly required the claimant to proceed by petition, and shows that such was the intention of Congress under the act of 1834. Congress struck out the section of the law requiring the district attorney to appear, but did not alter the character of the proceeding. The United States appeared by the district attorney whenever they pleased, as in Ferreira's case. They had notice of the proceedings, for they authorized the party to proceed against them by petition, and had the option to appear or not as they pleased, and they are barred by the proceeding, as are all the world having notice and a right to appear in proceedings in admiralty. Sovereign States are never made parties defendant, having notice, they appear or not, as they choose. *Ex parte* proceedings before courts and judges are as much judicial as proceedings *inter partes*. The judges represented the United States. They appointed and instructed the commissioners to take evidence, filed cross-interrogatories, and cross-examined the witnesses, as the record in all cases will prove.

Had not Congress intended the judges to act in the judicial capacity in which they had already been constitutionally appointed, they would undoubtedly have provided for their appointment and qualification, as they did in the act passed to execute the eleventh article of the same treaty.

Had they understood that the ninth article was to be executed like the eleventh article—by a board of commissioners—they would have left the *selection* and nomination of the commissioners to the President, as the Constitution required. There is no instance where Congress has undertaken to name the commissioners under a treaty, or to appoint them by an act. Such a proceeding is unprecedented, and would be an illegal and unconstitutional absurdity.

The transfer of the duty of deciding these claims, from the territorial to the district judge of the United States in 1847, when Florida was admitted into the Union, was a clear legislative interpretation that the duty was *judicial*. The district judge was only capable of performing *judicial* duty, and of receiving *judicial* jurisdiction. If the act of 1823 could, constitutionally, appoint the *individual* who then held the office of judge, a commissioner, he must have performed the duty in his *individual capacity*. But the person who then held the office of judge, (Hon. Joseph L. Smith,) had been dead many years when the act of 1834 was passed; and if the supposed appointment had been individual and personal, a new appointment became necessary on his death. And again, the removal of such individual from office could not have operated a transfer of the duty to his official successor, unless the duty to be performed appertained to the office. This is too plain for comment or illustration.

If the acts passed to carry the ninth article of the Florida treaty into effect are susceptible of two constructions, one of which will carry the treaty into effect, and the other *defeat* its execution, upon every rule of construction the former interpretation must be adopted.

For these reasons, it is confidently submitted that the Florida judge must be holden to have acted judicially, as the treaty required. He could not have acted in any other or different capacity, because he had never been constitutionally appointed in any other, except of a judge.

2. The Secretary of the Treasury acted in his executive capacity,

such Secretary. He had never been legally or constitutionally appointed in any other. His sole duty was to pay the claims "out of any money in the treasury not otherwise appropriated." Of course acted in that capacity in which he was legally authorized to pay money out of the treasury. No such authority could be conferred upon a commissioner to adjudicate claims under a treaty.

3. The Secretary of the Treasury, therefore, was *no part of the treaty tribunal* to establish the claims under the treaty. The treaty required that they should be established judicially, and he did not and could not constitutionally act in that capacity. His authority to revise the decisions of the judge, as a part of the treaty tribunal, has been assumed without the slightest warrant of legal authority, and upon a series of the most palpable errors, both of law and fact, the inevitable consequences of which would be to render the acts utterly unconstitutional and void, and defeat the acknowledged object for which they were passed, to wit: the full and complete execution of the treaty. A construction which would produce such a result, when a different and not unreasonable construction would avoid that result, and give a legal effect to the act and to the conceded intention of the legislature, violates every known rule of interpretation.

Another consequence would be, that all the claims rejected by the judge would be revived against the United States, and it would be the plain duty of this court to report a bill to Congress for the execution of the treaty.

That the obligations of treaties, whether executed or executory, are the supreme law of the land, and binding on all courts of the United States, see the case of the United States *vs.* The Schooner Peggy, 1 Cranch, 256.

For the rules of construction sanctioned by the Supreme Court of the United States, see the case of the United States *vs.* Freeman, 3 Howard, 556.

4. The rights of the claimants, under the treaty and law of nations, have never been decided by any Secretary of the Treasury. They all declare that their decisions were based upon the usage of the department, and not upon the treaty and law of nations. If their rights under the treaty yet remain undecided, are they never to be decided? And if they are, by whom? If the Secretary who was directed to pay the decrees of the judge, agreeably to "the provisions of the treaty," has failed to perform that duty, and to execute the law, does that annihilate the treaty obligation, he being no part of the tribunal stipulated by the treaty? The Supreme Court concedes that the claimants have a right to apply to Congress for a correction of his errors. Does this court mean to overrule the Supreme Court on that point? If not, and if the claimants have a right to go to Congress for relief, is it not the plain and unquestionable duty of this court to decide the rights of the party under the treaty, and to report such bill (if any) as may be necessary to secure those rights and to carry the treaty into full and complete effect?

This court is authorized and required, by the act of its organization, to hear and decide all claims "arising under any law of the United States," or under "any contract, express or implied."

This claim arises under acts of Congress which require the Secretary of the Treasury to pay the satisfaction stipulated by the ninth article of the Florida treaty. If the Secretary has not paid everything which the treaty, according to its just obligations under the law of nations, requires, he has failed to execute the law ; and the duty of this court is the same in this case as it is in any other where the Secretary has failed to execute the law ; namely, to report a bill to Congress for the relief of the claimants.

All the *political* power (and all the *legislative* power) necessary to carry the treaty into full effect has been exercised, by providing by law for the *establishment* of the claims by the judge "agreeably to the provisions of the treaty," and their payment by the Secretary when just and equitable, "within the provisions of the treaty."

The only question that remains, is one of the execution of the acts of Congress. When they are executed, the treaty must necessarily be executed.

Most of the claimants are *citizens of the United States*, who have no right to go to Spain for her interposition ; but who have a right, like the claimants to land under the eighth article of the same treaty, to go directly to any branch of the government of the United States for the execution of the treaty, or of the acts of Congress passed to carry it into effect, and who have no right to go to Spain for that purpose.

Again : this claim arises under a solemn international contract, which is also made by the Constitution the supreme law of the land, and if it has not been fulfilled according to its fair and just obligations under the law of nations, it is the clear and undoubted duty of this court to report a bill to Congress for its fulfilment.

CHA. E. SHERMAN,  
*Attorney for Claimant.*

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## APPENDIX.

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### No. 1.

NOTE.—The following are the translations referred to in the opinion of SCARBURGH, J.:

#### 1.—*Translation furnished by the Solicitor.*

Extract from the Treaty with Spain of 1819 :

Y los Estados Unidos satisfarán los perjuicios, si los hubiese habido, que los habitantes y oficiales Españoles justifiquen legalmente haber sufrido por las operaciones del Ejército Americano en ellas.

[Translation.]

And the United States shall (or will) satisfy (or make satisfaction) for the injuries, if any there should have been, which the Spanish inhabitants and (Spanish) officers may or shall judicially prove, according to law, that they have suffered (literally to have suffered) by the operations of the American army in them (the Floridas).

NOTES.—The words *si los hubiese habido* are about as literally translated, I think, by “if any there should have been,” as they could be, preserving their plain meaning at the same time.

I understand the word *Españoles* to apply as well to *habitantes* as to *oficiales*. It seems to have been so understood by the negotiators of the treaty, and the arrangement of the words favors that idea, I think. *Oficiales Españoles* means Spanish officers, not officers of Spain; and in this case there might be a difference as well as a distinction. If the word was *España*, instead of *Españoles*, then it would not refer to *habitantes* without changing the phraseology of the sentence.

The words *justifiquen legalmente* are accurately translated, in my opinion, by “may judicially prove, according to law.” *Justificar-justum facere* is a verb that has a good many meanings. When it is used as a law term, as it is in this clause of the treaty, it signifies *that*, or something equivalent. The translation might be varied, and the meaning still preserved; but, to be correct, it must convey the idea that the injuries (named in the treaty) are to be proved by judicial proceedings of some kind, conducted in legal manner and form—*legalmente*. Esriche says, in his Spanish Law Dictionary, that the word *justificación* means the proving of something by documents or witnesses; and *justificar* means, in Spanish law, to produce judicially written or oral proof of a thing.

2.—*Translation furnished by the Counsel for the Petitioner.*

Y los Estados Unidos satisfarán los perjuicios, si los hubiese And the United States will satisfy the injuries, if them there have habido, que los habitantes y oficiales Españoles justifiquen\* been, which the inhabitants and officers of Spain may judicially prove legalmente haber sufrido por las operaciones del Exército according to law to have suffered by the operations of the army Americano en ellas.

\*American in them, (the Floridas.)

NOTE.—This translation is made word for word, as being more satisfactory.

No. 2.



TREASURY DEPARTMENT,  
October 7, 1838.

SIR: I have received a letter from Col. Downing in which he expresses an apprehension that you might be misled by some remarks in my communication to you of the 24th of July last.

He seems to think that an inference may be drawn from that com-

\*Justifiquen is translated “may judicially prove.” It is the subjunctive present of the verb *justificar*. This verb is translated into Latin by the Spanish academy, “*in jure, iudicio probare*,” and is explained, in Spanish, by the same Academy, as follows:

“Probar judicialmente alguna cosa.”  
To prove judicially any thing.

(See Dictionary of Spanish Academy, verb JUSTIFICAR.)



munication unfavorable to the claimants in respect to the amounts allowed in cases, and for damages coming clearly within the principles adopted by the department. As no such design was entertained by the department in writing that letter or any other, I proceed cheerfully to state the fact; nor do I hesitate to add that, though in some cases the amount of the awards may have been reduced here on particular items in consequence of the parties' own exhibit, not claiming so much as you allowed, or for some other special reason, yet, in general, I do not apprehend that your awards have been higher as to the items approved here than the evidence warranted. On the contrary, several instances have come under my notice, where, unless some local knowledge of men and things, not appearing on the record existed and modified the result, I thought I could have felt justified in granting a larger sum for particular injuries than was allowed in the award.

But you are best acquainted with the country where the claim originated, with the value of property there, and with the character of the respective witnesses; and my chief object in this communication is merely to prevent any conclusion which it is supposed may be liable to be drawn from my former letter, that an opinion is entertained by this department not favorable to the great care and diligence exercised by you in protecting the government from the payment of damages larger in any particular case, or under any particular head, than were actually sustained by the claimants. When the awards have not been sanctioned, it has generally been for other causes, which from time to time have been fully explained either to you or the parties, or their counsel, and which have not been inconsistent with an anxiety here that the real sufferers in Florida from the acts of the American troops in 1812 and 1813 should receive all the indemnity which the existing acts of Congress, and the former settled construction of them, appear to justify.

Respectfully yours, &c.,

LEVI WOODBURY,  
*Secretary of the Treasury.*

Hon. R. RAYMOND REID.

### No. 3.

*Mistakes of FACT apparent on the face of the decision in Ferreira's case*  
13 How. 40.

1. That the act under which the claim of Ferreira was *adjudicated*, required "no petition."
2. That the question as to the character in which "a judge acts in a case of this description \* \* \* arose in Hayburn's case."
3. That the act of 1792 imposed the duty on the court "*eo nomine*, and not personally on the judges."
4. That "the motion for a mandamus in Hayburn's case" was "made merely for the purpose of having it judicially determined in

us (Supreme) Court whether the judges, under the law, were authorized to act in the character of *commissioners*."

5. That the question as to the authority of the judges to act as commissioners under the act of 1792 "*was not decided in the Supreme Court.*"

6. That "it appears from the *note* to the case of Hayburn that a majority of the judges of the Supreme Court were of opinion that if the law of 1792 had conferred the power on the judges, they would have held that it was given to them personally by that description, and would have performed the duty as *commissioners*, subject to the revision and control of the Secretary and Congress, as provided by the law."

7. That "the opinions of all the judges embrace *distinctly and positively* the provisions of the act of 1823, and declare that, under such a law, the power was not judicial within the grant of the Constitution, and could not be exercised as such."

8. That "there is no record of the proceedings in the district court" in Ferreira's case.

#### *In the Note.*

9. In supposing that the saving, in the repealing act, of "all rights founded upon any *legal adjudication*," referred to rights founded upon the decisions of the judges as *commissioners*.

Every one of the above points and statements is a *clear and demonstrable error of fact*.

The errors of law, consequent upon these errors of fact, apparent on the face of the opinion, are even more numerous. They are pointed out in the brief filed on the first hearing of this cause, pp. 22, 23, 24.

#### *Hayburn's Case.*

This was a motion for a *mandamus* to be directed to the *circuit court* for the district of Pennsylvania, commanding the said court to proceed in a certain petition of William Hayburn, who had applied to be put on the pension list of the United States as an invalid pensioner.

The Attorney General (Randolph) at first proceeded *ex officio*, and afterwards on behalf of Hayburn, and argued the case on "the merits," upon "the act of Congress, and the refusal of the judges to carry it into effect."

"THE COURT observed that they would hold the motion under advisement until the next term, but *no decision was ever pronounced*; the legislature, (Congress,) at an intermediate session, provided in another way for the relief of the pensioners." (2 Dal. 409.)

The reasons of the circuit and district judges for not proceeding *judicially* under the act are contained in certain *extra-judicial* communications addressed by them to President Washington, to be laid before Congress, which are contained in a note to Hayburn's case.

No *judicial decision* was had under the act of 1792, except that of the Supreme Court in the case of Yale Todd, in which it was unani-

mously decided that the judges could not act as *commissioners* under the said act. *No other point was decided in that case.*

The leading reason assigned by *all* the judges for not acting *judicially* under the act was, "because the business assigned to the court by the act was not of a *judicial nature*." None of the judges, except those of the district of New York, expressed or intimated any opinion that the judges could act as *commissioners* under the act. None of them expresses the opinion that they could have so acted if they had been named in the act as *judges* and not as a *court*. The judges of the district of New York concluded to act, and did act, as *commissioners*; and Congress, by the repealing act of 28th February, 1793, directed a decision of the Supreme Court to be obtained to test their authority to act in that character. That decision was had in the case of Yale Todd, and the Supreme Court, composed in part of the judges who had acted as commissioners, decided *unanimously*, as above stated, that they had no authority so to act, and Congress immediately passed a law declaring their action in that capacity invalid.

The Executive had previously repudiated the action of the judges of the district of New York as commissioners, and had instructed the Attorney General to apply to the Supreme Court for a mandamus to the "*circuit court*" for the district of Pennsylvania, to compel that court to proceed *judicially*, as a *court*, (not as *commissioners*,) to execute the law. This was done in Hayourn's case, as above stated. So that it is a matter of *absolute certainty, proved by the Executive, legislative, and judicial records of the country*, that *every department of the government* denied the construction placed upon the act of 1792 by the judges of the circuit court for the district of New York, as set forth in the note to Hayburn's case; and that Mr. Chief Justice Jay, and Mr. Justice Cushing, when sitting in the Supreme Court, united with the other judges of that court in overruling their own construction of the act.

The opinion of the Supreme Court in Ferreira's case relies upon the extra-judicial opinions or letters of the judges, addressed to President Washington, to be laid before Congress—which opinions were not given in any case brought judicially before the judges, and were given without argument or judicial deliberation—and which were, after full argument and judicial deliberation, unanimously overruled in the Supreme Court, by the same judges, in the case of Yale Todd.—(Am. State Papers, vol. 1, Miscellaneous, pp. 49, 50, 51, 52, 53, 78. Special Message of President to Congress, of Nov., 1792, Ho. Journal, vol. 1, pp. 614, 649, 659, 666. Annals of Congress, 2d Congress, from 1791 to 1793, pp. 556, 557, for Memorial of Hayburn to Congress. Same book, p. 803, for amendment requiring judicial decision by Supreme Court. Ibid, 3d Congress, Supreme Court, decision in Todd's case, reported to Congress by Secretary of War. For Pension act of March 27, 1792, see 2d vol. Laws U. S., 1 Stats. at Large, p. 243. For act repealing same, see Stats. at Large, vol. 1, p. 324. For joint resolution of Congress, of June 9, 1794, rejecting all pension claims allowed by judges, as commissioners, under the aforesaid act of 1792, see Stats. at Large, vol. 1, p. 401. Ram. on Legal Judgment, p. 183. 2 Bing., 292, 297, 303.)

The first opinion, delivered before the case of Yale Todd was brought to the attention of the Court, shows that the case of Ferreira was disposed of without full examination, upon the authority of the extra-judicial opinions of the judges set forth in the notes to Hayburn's case. That opinion declared that "the question as to the character in which a judge acts in a case of this description *is not a new one*. It arose as long ago as 1792, in Hayburn's case, reported in 2 Dallas, 409," (p. 4.) After setting forth these extra-judicial opinions, which had been overruled by the Supreme Court in Todd's case, the opinion adds: "After the decision thus made in 1792, and acquiesced in at the time by the other departments of the government, we think that the question must be regarded as *settled*, and not now open to controversy under the act of 1823."—(Printed opinion first delivered, on file in the office of the clerk of the Supreme Court.)

The note appended to the said decision "by order of the court," after the decision in the case of Yale Todd was brought to its notice, divests the said decision of all authority, and leaves the decision of the Supreme Court, in the case of Yale Todd—that the judges could not act as commissioners, under the act of 1792—in full and unimpaired force.

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No. 4.

This is to certify that the following sums of money are respectively due to the persons hereinafter mentioned for arrearages of their pensions up to the fourth day of March, 1789, in pursuance of the adjudication of the judge of the district of Maine, by virtue of an act passed 23d March, 1792, entitled "An act to provide for the settlement of the claims of widows and orphans barred by the limitations heretofore established, and to regulate claims to invalid pensions."

John Bean.....	\$150 00
Dudley Bradstreet.....	370 00
Squire Bishop, jr.....	65 00
Seth Delano.....	68 50
Peter Hopkins, jr.....	250 00
Joseph Roberts.....	155 00
Ezekiel Spaulding.....	28 00
Anthony Starbard.....	15 00
Moses Cass.....	95 00
Levi Chadburn.....	120 00

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1,316 50

TIMOTHY PICKERING,  
*Secretary of War.*

AUDITOR'S OFFICE, March 2, 1795.

Examined: EZ'L FREEMAN.

COMPTROLLER'S OFFICE, March 2, 1795.

Examined: P. H. KUHL.

DEPARTMENT OF WAR, March 2, 1795.

I certify the within and foregoing to be a true transcript of voucher No. 6,530, now on file in this office.

F. BIGGER, *Register*.

MAY 10, 1856.

The within sums were allowed by the Auditor and Comptroller of the Treasury Department, March 2, 1795, as appears by the statement on file.

F. B.

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No. 5.

*Claims under the ninth article.*

DISTRICT OF EAST FLORIDA,  
*At Chambers, August 20, 1834.*

Notice is hereby given, that the undersigned is prepared to receive such claims for losses occasioned by the troops of the United States in the year 1812 and 1813 as have not heretofore been presented to the judge of this district, or in which the evidence was withheld in consequence of the decision of the Secretary of the Treasury, that such claims were not provided for by the treaty of 22d February, 1819, between the governments of the United States and Spain.

Each claim will be perferred in the form of a petition, in which the petitioner will set forth *particularly* the nature and amount of the losses sustained, the time at which they occurred, and (as the case may be) that the claim has not been before presented to the judge of this district, or that the evidence in said claim was withheld in consequence of the decision of the Secretary of the Treasury.

The petitioner will moreover aver, that at the time of suffering the losses complained of he was a subject of Spain, and that previous to the happening of said losses the agent or troops of the United States had entered East Elorida.

The petition *signed by the petitioner* will be filed with the undersigned, who will then appoint a time for receiving proofs in support of the same.

All claims must be presented within one year from the 26th June last.

Applications will be made at the chambers of the judge between the hours of *ten* and *four* in the day.

ROBT. RAYMOND REID,  
*Judge of the supr. court dist. East Florida.*

The act of 26th June, 1834, was appended.

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No. 6.

TREASURY DEPARTMENT, *Sept. 19, 1834.*

SIR: I am in the receipt of your letter of the 3d instant, relative to the manner of carrying into effect the provisions of the act of Con-

gress approved the 26th of June last, "for the relief of certain inhabitants of East Florida."

It is to be observed, in reply to the first inquiry made in your letter, that it is thought proper that the facts set forth in the claimants' petitions should be substantiated by their oaths respectively, and that the witnesses who may be adduced to corroborate any facts should be examined before you, in order that such questions may be propounded to them as you may conceive to be necessary to elucidate the claim; but in cases where manifest inconvenience would arise in requiring the attendance of a witness before you, direct and cross-interrogatories may be framed, and the testimony taken in that manner. As the act of Congress makes no appropriation to defray the expenses, alluded to in your letter, of clerk hire, office rent, and stationery, no allowance can be made by the department for either of those objects. Besides, as it will be the duty of claimants to prepare statements of their claims, and have the testimony committed to writing by their lawyer or agent, it is not considered that you will require the service of a clerk.

I am respectfully, &c.

LEVI WOODBURY,

*Secretary of the Treasury.*

ROBT. RAYMOND REID, *Judge, St. Augustine.*

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IN THE COURT OF CLAIMS.

ON THE PETITION OF LETITIA HUMPHREYS, CLAIMING UNDER THE FLORIDA TREATY.

*Brief of Solicitor on rehearing*

The questions in this case may be disposed of under two heads of inquiry: 1. Whether the class of claims in question is provided for by the treaty. 2. If so, whether, on the construction given to the treaty by the claimants, by which it is insisted the United States undertook to pay the claims established *by process of law*, there have been any claims so established or any law enacted providing for such proceedings.

On the first point my former brief, adopting the argument of Senator Butler, and the report submitted by the Secretary of the Treasury, going over the same ground, is so conclusive that no attempt has been made to meet it.

The only argument offered on the other side is that the Spanish copy of the treaty does not contain the word *late*, which limited the stipulations of the 9th article to the injuries committed in 1818. Mr. Forsyth, one of the most accomplished statesmen and scholars, our minister for many years at the court of Madrid, explains, in his report in 1825, that whilst the word *late* itself is not in the Spanish copy, the context implies the same meaning.

The reference is also to injuries done by an American army—not by

several armies or on several occasions. Nor are the injuries complained of here—supposed to be committed by the volunteers under Matthews—properly speaking, the work of an American army.

However it be in Spanish, the meaning is plain in English ; and, as it was an obligation undertaken by the nation using the English language, we have the right to insist that the plain words of our own language should not be overruled by any uncertain words in the Spanish language ; and, accordingly, the treaty received this construction contemporaneously by the Secretary of the Treasury, with the sanction of Mr. Adams, who negotiated it, and by Mr. Monroe, the President, under whose authority it was negotiated.

An appeal was then made to Congress, and I took occasion, on the former argument, to read the reports of the various committees on this point to the court, including that of the committee by whom the act of 1834 was reported, all concurring in the correctness of the decision at the Treasury Department, that the claims it provided for were not embraced in the provisions of the treaty, and proceeding, in reporting a bill *for the relief of the claimants*, upon the express ground that the relief they proposed was granted in consideration of the circumstances of the case, and not in fulfilment of any treaty obligation, and on the assurance mentioned in the report, as given by the delegate from Florida, that not more than \$100,000 would be required by the bill.

In the face of these facts it is contended that Congress, by this very act, not only granted relief to the claimants, but gave a legislative construction of the treaty, overruling the decision of the Executive Department, and of the committee which reported it. In other words, that whilst the committee were saying in the report which accompanied the bill that the treaty did not provide for the case, in the act which they report, and which was passed as reported, they say the reverse !

It is scarcely possible that this could be, and the language of the act ought to be very explicit to admit of such a supposition. But, on an examination of the language, no warrant will be found for it ; and, so far from it, the very contrary appears. The only foundation for the argument, indeed, is the fact that the act adopts the machinery for the ascertainment of the claims allowed under it, which was put in force to ascertain those coming under the treaty, and allows the claims heretofore reported by the judge and rejected by the Secretary because not under the treaty, provided that the Secretary shall deem them just. So far from this being an overruling of the Secretary's decision, it is an affirmance of it. Before, it was not lawful to allow any not embraced in the treaty, (see § 2, art. 23, 3 Stat., 768 ;) whereas, by this act the Secretary is not so limited ; but he is authorized to allow such of the awards as he thinks *just*, and they are not required, as by the former act, to be within the treaty.—(See act 34, 6 Stat., p. 569.)

For considerations entirely distinct from treaty obligations, which are fully set forth in the several reports, Congress thought proper to allow, in 1834, the amounts reported by the judge in Florida, but which had been rejected by the Secretary of the Treasury, as the law

required him to do, *because they were not within the provisions of that treaty*, provided the Secretary should deem them *just*. The act was, therefore, strictly in accordance with the reasoning of the reports—that it was just to indemnify the sufferers in 1812-'13, although they were not, in fact, embraced in the treaty stipulations; and the effect of the act was to strike out the condition of the act of 1823, that the claims should be within the treaty.

If anything could add to the conclusiveness of these considerations it would be the title of the act of 1834, which is *not an act further providing for the carrying into effect the treaty of 1819*, as it would have been if Congress had intended to recognize the claims there provided for as embraced in the treaty. The difference in the title from that of 1823 shows of itself the different footing on which the claims stood before Congress.

II. If we may suppose, however, that the claims before us come under the treaty, it is further necessary, in order to maintain the case of the claimants here, not only to show that the treaty provided for the payment of such demands as should be established *by process of law*, but that the demand in question has been so established.

Whether we adopt the construction given to the words of the treaty by the claimants in this respect, and admit that it was contemplated that the claims should be established by what is technically known as *process of law*, or construe the treaty as Congress did—as authorizing an examination of the claims by a judge at his chambers, who should report the evidence and his opinion of each case to the Secretary of the Treasury for his revision—is alike immaterial, so far as the result on the case here is concerned. For, under his construction, nothing has been done, or all that has been done is irregular and void: and on the other construction, the tribunal actually constituted has decided against him. The scheme is to get rid of the doings of the Secretary, because they are against the claimant, and leave the action of the judge standing, because that was for the claimants. To do this, it is insisted that the treaty stipulated there should be paid what should be established *by process of law*, which, it is insisted, were proceedings in which, by the Constitution, a Secretary or executive officer could take no part, because the Constitution had vested the judicial power in the Supreme Court, and in such *inferior courts*, &c.; that it is inconsistent with this distinction, established by the Constitution, to permit a Secretary to revise the judgments of a court, &c., &c.

But here we have not the judgment of a court, but *ex parte* examinations taken at the chambers of the judge, reported to the Secretary with the judge's opinions on the facts so proved. Whether it is admissible to impose such duties on a judge, it is unnecessary to inquire. It is very certain, I think, that proceedings of a similar character affecting the rights of individuals would be held invalid and of no effect. For example, if any one of the supposed sufferers by General Matthews' proceedings in Florida should have sued him for trespass, as Mitchell was sued by Harmony, it would not avail to show that the judge had acted in his chambers on that claim and decided against it.

It does not advance the case to show that the treaty contemplates proceedings in court, over which the Secretary cannot constitutionally



exercise supervision, unless such proceedings were provided for by law, and are shown to have taken place, and the record of them is produced. Because, unless the law provided for carrying out the treaty in this respect, and the courts have executed it accordingly, it is of little moment what the passage in the treaty means. But the law does not provide for the institution of suits, and the proceedings under it were not of the character described by the term *process of law*. (See this point discussed in the case of Ferreira, 13 Howard, p. 47, et seq.)

To make the record produced of any effect, as evidence of proceedings under the treaty, it is necessary for the claimant to relax the strict meaning of the words; and when this is done so as to admit that they may be satisfied by the action of a judicial officer *out of court*, there is then certainly no constitutional difficulty in the revision by the Secretary, because the judicial power spoken of in the Constitution, which is exclusive, is that *lodged in the courts*. Besides, the decisions in Yale Todd's case, reported in the note to Ferreira's case in 13 Howard, pp. 48-52, as well as the opinion in Ferreira's, declares that such an inquiry as was here committed to the judges was not a judicial function which could have been constitutionally devolved on the court, the inquiry being there as here an *ex parte* inquiry proper only to commissioners.

It is then clear that if the treaty was only to be satisfied by a proceeding over which the Secretary should exercise no supervision that no such proceedings have been shown.

As respects the proposition that the Secretary was merely directed to pay the awards, and that he was not made by law the revisor of the proceedings of the judge, it seems sufficient to refer to the language of the act of 1834, authorizing payment of the awards "*on all cases where the decision of said judge shall be deemed by the Secretary of the Treasury to be just.*" Of course the Secretary could pay none of the awards he did not think just, and unless he revised the decisions he could know nothing about the justice of the claims.

No allusion is made to this language in the argument in support of the proposition, but the effort is made to maintain it by reasoning exclusively on the second section of the act of 1823, and assuming it as intended to carry into effect the treaty both as respects the claims and as to the particular mode of establishing them. As the treaty speaks of "*process of law*," and the act speaks of "*adjudging*," and "*adjusting*," "*agreeably to the provisions of the treaty*," and "*judges*" to decide, it is thought to be plain that nothing but judicial proceedings are meant; and although the act declares "*these decisions with the evidence on which they are founded shall be by the said judges reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof to the person or persons in whose favor the same is adjudged,*" these words are not to be permitted to give a revisory power to the Secretary, because, if so, the action of the judge would in that case not be judicial. The amount of the argument is, that the treaty required the claims to be established judicially, and that cannot be said if the Secretary has any authority over the decision; and the act, to be construed consistently with this, must be construed so as to

let him look only to the jurisdiction of the judge, and so the words of the law, "just and equitable," go for nothing.

Those with respect to reporting the evidence are in like manner for no purpose, because it is never necessary in *judicial proceedings* to report the evidence to ascertain whether the court has jurisdiction. The proposition contended for plainly nullifies the second section of the act of 1823, as well as the provision quoted from the act of 1834, under which this claim arises, acted on without question till lately by every secretary since 1823.

It is said, however, that this court may entertain the petition if the treaty has not been fulfilled, because the government had entered into a contract by the treaty, the enforcement of which devolved on this court by the act creating it.

But it has been more than once decided by this court, following the decision of the Supreme Court, in *6 Peters*, (see *Thomas' case*.) that it was incompetent for this court to revise the action of other tribunals to whom, as in this case, the decision of specific questions had been committed by Congress.

It is not proposed to ignore the act of 1834 and the proceedings under it. Not at all. The argument is, that the treaty has not been fulfilled, because, according to the principles of the laws of nations, an agreement to make satisfaction for injuries includes both payment of the amount of the loss and interest thereon till paid; and when we look into the record we find the Secretary refused to pay interest, and it is said he might with equal propriety have refused to pay principal. With equal reason it may be urged that some of the claims rejected altogether, if there were ever any such—I confess, however, I have never heard of any such—must be allowed, to fulfil the treaty. But the law has committed the discretion to the judge, subject to revision by the Secretary, to decide on the amount necessary to make the stipulated satisfaction: and the law establishing this court has not made it a court of error to revise the acts of such tribunals, either as to the facts on which they have proceeded or the principles by which they have been governed; and it is as true now as when the opinion in *Ferreira's case* was written, that there is no tribunal to review the decision in such cases. What induced the Secretary to cut off interest and part principal, as Mr. Woodbury did in this case, after the patient investigation, as the notes on the record in his handwriting, throughout, show that he made personally and critically, it is not for us to inquire. He probably understood the whole subject fully as well as we ever shall, and, I have no doubt, much better than Mr. Corwin did when he allowed the part of the principal which Mr. Woodbury, after such careful sifting and comparison of the testimony, had disallowed. Mr. Woodbury was bound to allow only what he was satisfied was *just*, no matter under what name it was claimed, and I am sure he allowed all he thought was *just*.

It is not asked that all the proceedings under the law should be held for naught, and that the court should proceed to the consideration as if nothing had been done, but only that not enough has been done. What I have said in my former brief on this point I commend to the attention of the court. Whenever the money paid shall be refunded,

and a judicial investigation asked, I should favor an act granting such an investigation and paying all that can be proved under it.

The character of the testimony and proceedings, and the amounts already obtained from the treasury, can leave no doubt on any one's mind that the claims have been more than ten times overpaid; and I hope the court will not accede to the request made to express any opinion on any abstract question as to interest, or on any point not called for by the case.

No claim for interest was pressed in these cases till the principal was, by dint of importunity, obtained from the successors of Mr. Woodbury, who illegally set aside his judgments and allowed, without any additional evidence, and I have no doubt without considering all the evidence already in the department, amounts which he, upon patient and laborious investigation, had rejected.

This was contrary to law and the settled usages of the department, not to open the decisions of prior incumbents of the office without new proof.

Notwithstanding this evident favoritism, there was yet not quite courage enough in those who thus set aside Mr. Woodbury's judgments on the principal sums allowed by the Florida judge, to set aside his judgment on the interest. But the scheme of bringing the question before the Supreme Court was connived at by the department, in pursuance of which the district attorney took the appeal in Ferreira's case; and the character of the proceeding is illustrated by the singular circumstance that the appellee who moves to dismiss the appeal for want of jurisdiction in the court, argues against his own motion, and whilst Mr. Crittenden, the Attorney General, saying he knew not how the case got there, argued in favor of the motion of the defendants to dismiss it. The court granted their motion, however, and proceeded carefully to pass upon their arguments, and overruled them; and it is this decision in a case thus brought up by themselves, and upon which they invited the decision of the Supreme Court, no doubt with the understanding that if the court gave a favorable opinion they should have the money, which they now except to, because, contrary to their expectations, the Supreme Court decided against them. Aside from the great authority of the court, there is a reason special to the case which ought to make the decision obligatory. It is a breach of faith to renew the claim here, because, when they had been permitted to get the decision of that court upon it, with an agreement to pay if the decision was in their favor, the circumstances imply an agreement to submit on their part; and whether such an agreement was in fact made or not every fair-minded man would say they should be bound by the decision.

M. BLAIR,

*U. S. Sol'r.*

LETITIA HUMPHREYS *vs.* THE UNITED STATES.

ion on the re-argument by Chief Justice GILCHRIST.

the 9th article of the treaty with Spain of the 22d of February, 1819, (3 St., 260,) it is provided as follows :

"The United States will cause satisfaction to be made for the injuries, which, by process of law, shall be established to have been inflicted by the Spanish officers and individual Spanish inhabitants by the operations of the American army in Florida."

On the 3d of March, 1823, (3 St., 768,) an act was passed entitled "An act to carry into effect the 9th article of the treaty concluded between the United States and Spain the 22d day of February, 1819."

The first section provided "that the judges of the superior courts established at St. Augustine and Pensacola, in the Territory of Florida, respectively, shall be, and they are hereby, authorized and directed to hear and adjust all claims, arising within their respective jurisdictions of the inhabitants of said Territory, or their representatives, in conformity to the provisions of the ninth article of the treaty with Spain by which the said Territory was ceded to the United States."

The second section enacted "that in all cases in which said judges shall decide in favor of the claimants, the decisions, with the evidence on which they are founded, shall be, by the said judges, reported to the Secretary of the Treasury, who, on being satisfied that the same are just and equitable, within the provisions of the said treaty; shall cause the amount thereof to be paid to the person or persons in whose favor the claims are adjudged, out of any money in the treasury, not otherwise appropriated."

Secretary Rush held that the words in the treaty, "the late operations of the American army in Florida," included only the injuries sustained in the years 1818 and 1819, and that the injuries sustained in the years 1812 and 1813 were not provided for by the treaty, and he refused to pay any claims for injuries sustained in those

On the 26th of June, 1834, (6 St., 569,) an act was passed providing that the Secretary of the Treasury should pay the amount awarded by the judge of the superior court at St. Augustine, under the act of March 3, 1823, for losses occasioned in East Florida in the years 1812 and 1813, in all cases where the decision of the said judge shall be in favor of the claimant, by the Secretary of the Treasury to be just.

The second section provided that the judge be authorized to receive, hear, and adjudge all cases of claims for losses occasioned by the American army in the years 1812 and 1813 not before presented to him, or in which the evidence was withheld in consequence of the decision of the court, and that such claims were not provided for by the treaty of 1819, and they should be presented to the judge within one year from the passage of the act.

The effect of this act appears to have been to authorize the claims to be paid which were rejected by the Secretary of the Treas-

sure in consequence of his construction of the word "late" in the treaty.

When Florida was admitted into the Union as a State the jurisdiction of the claims referred to was conferred upon the district court by the sixth section of the act of February 22, 1847.—(9 St., 130.)

In the present case, the territorial judge in Florida, on the 15th day of August, 1839, certified his decree in favor of the estate of which the claimant is administratrix, for the sum of \$3,800, with an interest of five per cent. from the 10th day of May, 1813. The sum of \$3,800 has been paid at the treasury, but the payment of interest has been refused, and the question is, whether the claimant is entitled to the interest.

In the able and thorough discussion which has been had in this case, much was said concerning the extent of the powers of the Secretary under the acts of Congress relating to this subject, and it becomes necessary to examine them with care in order to ascertain their meaning.

The second section of the act of 1823 provides that the decisions of judges, with the evidence on which they are founded, shall be reported to the Secretary of the Treasury, who, on being satisfied that the same is just and equitable, within the provisions of the treaty, shall pay the amount thereof.

It is contended by the claimant that the only power of the Secretary was to ascertain from the evidence whether the claims were within the provisions of the treaty, that is, that the claimant was a Spanish subject and not a citizen of the United States; that the injury was occasioned by the operations of the American army, and not by other causes.

No authorities need be cited at this day to show that an act must be so construed that the whole of it shall be carried into effect if possible.

Now, if the authority of the Secretary were confined to determining whether the claim came within the provisions of the treaty, the words "just and equitable" might have been omitted, and were mere surplusage. The act would then read, that the Secretary, "on being satisfied that the same is within the provisions of the treaty, shall pay the amount thereof." It is admitted that the Secretary has a certain duty to perform in relation to the decision of the judge besides paying its amount. What reason is there for determining that his duty relates to the question whether the claim is within the provisions of the treaty rather than to the question whether the claim is just and equitable? Whether the claimant was a Spanish subject, and whether his losses were occasioned by the American army, are certainly questions as easy of decision as the justice and equity of his claim. Why should a supervisory power be vested in the Secretary upon one point rather than upon the other? Now, the words "just and equitable" have a definite meaning. They express the qualities of the claim. We cannot suppose that they were inserted at random, thoughtlessly, and without the intention that any effect should be given to them. We can perceive no grounds on which any court of justice could reject them. All precedent, all reason would be against their rejection.

We cannot discard them unless they are destitute of meaning, or are at variance with the evident purpose of the act.

Further, if instead of the words "just and equitable, within the provisions of the treaty," the language had been "justly and equitably within the provisions of the treaty," there might have been some ground for saying that such words meant only that the Secretary should determine whether the claim came fairly and properly within the treaty, upon a consideration of the evidence. But it is sufficient to say that such is not the language used. The words "just and equitable" have, in our view, a definite meaning of themselves. They have no connexion with the question whether the claim comes within the provisions of the treaty. They require the Secretary to determine whether the claim is just and equitable, and whether it comes within the provisions of the treaty. And the decision of one point is as necessary a part of his duty as the decision of the other.

Now, it is not denied that the Secretary is authorized to determine whether the claim is within the provisions of the treaty. The judge, by deciding in favor of a claim, decides that it is within his jurisdiction. The Secretary may review and re-examine that decision, and may determine that the case is not within the provision of the treaty, and therefore not within the jurisdiction of the judge. If he should reject the claim for that reason, he would render the decision of the judge entirely nugatory. Is there any reason for saying that Congress put it in the power of the Secretary to reject the claim altogether, because it did not come within the jurisdiction of the judge, and yet denied him the power to reject it on the ground that it was not just and equitable? We cannot perceive why the one power might not as properly be given him as the other; and why there was any reason for giving him a supervisory power over the question of jurisdiction, and denying him the same power as to the justice and equity of the claim. Moreover, whether the facts proved bring a claim within the provisions of the treaty is a question of law. Whether upon the facts proved, the claim is just and equitable, is not a question of law. The claimant's construction would amount to this: in relation to the question of law upon which the decision of the judge who is appointed to perform that duty may be presumed to be correct, the Secretary has the power to reverse his decision. But in relation to the equity and justice of the claim, which is not a question of law, and about which two equally honest men may reasonably differ, the decision of the judge is final. This is the conclusion to which, as it seems to us, the claimant's reasoning inevitably tends; and upon the question of the reasonableness of such a conclusion, it does not appear to us to be sound.

This claim was presented under the provisions of the act of 1834. That law, as we have seen, required the claims to be paid "in all cases where the decision of the said judge shall be deemed by the Secretary of the Treasury to be just."

Now it is evident, that, laying aside the act of 1823, and any bearing it may have upon the meaning of the word "just," there can be no doubt as to the power of the Secretary. If he does not deem a claim to be "just," he is not to pay it. The meaning of the word "just," in this connexion, differs but slightly, if at all, from the meaning of

the words "just and equitable" in the act of 1823. A just claim is also a just and equitable claim. The justice here referred to is that distributive justice which consists in deciding controversies according to the laws and to principles of equity. Such is also the proper construction of the words "just and equitable;" and so far as the words relate to the character and quality of the claim, we can see no difference in the effect of the two acts.

But it is agreed that the two acts, being *in pari materie*, are to be construed together, as if they were one law, and that the word "just" in the act of 1834 means "just and equitable, within the provisions of the treaty," according to the act of 1823. Admitting this to be true, and it is not necessary for us to deny it, it does not help the argument, for the question still recurs as to the meaning of the act of 1823.

This view of the meaning of the act is corroborated by the opinion of the Supreme Court in the case of Ferreira, 13 Howard, 47, where it is said that the claim is to be paid, "if the Secretary thinks it just and equitable, but not otherwise."

As a further illustration of our views upon this point, it may be added that a claim may be within the provisions of the treaty, and yet may not, as preferred, be just and equitable. That is, a claimant may prove that he was a subject of Spain, and that he suffered losses by the operations of the American army in Florida in the years 1812 and 1813. Upon a consideration of the evidence, the judge may be of opinion that the claimant has suffered losses amounting to the sum of \$1,000. The opinion of the Secretary may be that the claim is not "just and equitable" for that amount, but that it is so for the sum of \$500. Now, it appears to us that if the Secretary, upon examining the evidence should be of opinion that it would not be "just and equitable" to allow the claimant more than \$500, it would be his duty to reduce the claim to that sum, notwithstanding the decision of the judge. It is only in this way that, in our opinion, the proper effect can be given to the words "just and equitable;" and unless this effect be given them, they might, as we have intimated, as well have been left out of the act altogether. Moreover, as the evidence on which the decisions are founded is to be reported to the Secretary, it must be for the purpose of enabling him to examine and act upon it. If the claimant's construction of the act be correct, only so much of the evidence as relates to the question whether the claimant comes within the provisions of the treaty need be reported to the Secretary, for it is upon that only that he is to act. This would require us to say that, notwithstanding the language of the act, the judge might report only so much as relates to that question—a discrimination which we certainly have no authority to make, because the act requires the evidence, that is, the whole evidence, to be reported.

Our construction of the law, therefore, is, that it was competent for the Secretary to reduce the amount of the decision of the judge to such a sum as he should deem "just and equitable," and that in rejecting the interest he did no more than he was authorized to do by the act.

The 2d section of the act of 1823 provides that the Secretary, on

being satisfied that the decision of the judge is "just and equitable," "shall pay the amount thereof." It is argued that this last expression refers to the decision of the judge alone, and directs the Secretary to pay the amount of the decision.

Now it may be admitted, that, according to the strict grammatical construction of the sentence, the words "the amount thereof" do refer to the decision of the judge; and if the rules of grammar were also the invariable rules of construction to be applied in order to ascertain the meaning of a statute, the position of the claimant would be correct. But if, as we have endeavored to show, the Secretary is to determine whether the claim allowed by the judge be "just and equitable," the words directing "the payment thereof" must be applied to the decision of the judge, only *sub modo*, with a limitation, and must mean the amount of the decision, as limited and reduced by the Secretary. These words must be construed in reference to the meaning of that part of the section which precedes them. They have not, of themselves, such a controlling power as to deprive the words "just and equitable" of their efficiency, and mean only that when the claim has passed under the supervision of the judge and of the Secretary, the amount finally ascertained to be due shall be paid according to the provisions of the act.

We come now to the consideration of the treaty, as it may be remarked that, whatever else may be predicated of it, it is clear that it is nothing more nor less than a promise on the part of the United States that they will do a certain thing—that is, that they will cause satisfaction to be made for the injuries therein mentioned. Of itself, the treaty creates no tribunal, and authorizes no person whomsoever to take cognizance of any claim for such injuries. It was left to the legislature to determine upon whom the duty should involve of investigating and deciding upon the claims. It will hardly be contended that, in the absence of an act of Congress, any court in the Union could entertain jurisdiction of the subject-matter of the claims. It follows, then, that it is to the act of Congress, and to that alone, that we must look for the jurisdiction conferred upon the territorial judge in Florida. The promise made in the treaty was by the United States to Spain. If Congress has failed to keep that promise, it is Spain only, the other party to the contract, who has any right to complain, or to call the United States to account.

In the case of *Foster vs. Neilson*, 2 Pet., 314, 8 Curtis, 121, Chief Justice Marshall says: "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign power of the respective parties to the instrument. In the United States a different principle is established. Our Constitution declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the



political, not the judicial department, and the legislature must execute the contract before it can become a rule for the court."

Upon this point the reasoning of the Supreme Court in the case *The United States vs. Ferreira*, 13 Howard, 40, (19 Curtis, 373,) seems to us incontrovertible. It is there said: "The treaty certainly created no tribunal by which these damages were to be adjusted, and gave no authority to any court of justice to inquire into or adjust the amount which the United States were to pay to the respective parties who had suffered damage from the causes mentioned in the treaty. It rested with Congress to provide one according to the treaty stipulation. But when that tribunal was appointed it derived its whole authority from the law creating it, and not from the treaty, and Congress had the right to regulate its proceedings and limit its powers, and to subject its decisions to the control of an appellate tribunal, if deemed it advisable to do so."

"Undoubtedly Congress was bound to provide such a tribunal as the treaty described. But if they failed to fulfil that promise, it is a question between the United States and Spain. The tribunal created to adjust the claims cannot change the mode of proceeding, or the character in which the law authorizes it to act, under any opinion it may entertain that a different mode of proceeding, or a tribunal of a different character, would better comport with the provisions of the treaty. If it acts at all, it acts under the authority of the law, and must obey the law."

Now, it appears to us that the reasoning of the counsel for the claimant, in relation to the character of the tribunal in Florida, is unsound. It is assumed that, because the United States have promised that they will make satisfaction for the injuries which by process of law shall be established to have been suffered, and because the act of 1823 was intended to carry the treaty into effect, therefore the act must be construed with reference to the words "process of law" in the treaty, and the tribunal in Florida must be a judicial tribunal, whatever power of revision may be vested in the Secretary of the Treasury. This argument makes the ninth article of the treaty the paramount law of the case. Now this ninth article is not incorporated into the act, and the judge must examine it only for the purpose of ascertaining what injuries those were of which he was to take cognizance. If the claimant were a Spanish subject, and sustained injuries by the operations of the American army, the judge might examine further, and award such a sum as he considered "satisfaction" for the injuries he sustained. But whether his decision was final—whether it was a judgment, in the strict sense of the word—was not a legitimate question for his consideration. It was not necessary for him to determine whether the words "process of law" did or did not mean that the proceeding and decision must necessarily possess all the elements and attributes of a judicial proceeding. And we do not understand that Judge Benson, in his opinion, which is certainly the work of an able and investigating man, considers that this question is within his province. So far, then, as related to his duties, the words "process of law" do not require his examination, and the treaty in that particular does not for him furnish the paramount law of the case.

*judgments*, because the treaty provided for a process of law. It is necessary to assume that the decisions must be *judicial* decisions, or to make the deduction that no power to revise them can be given to the Secretary. But one of the strongest reasons for holding that the decision is not the judgment of a court of justice, is, that it is reported to the Secretary, with the evidence on which it is based, and that the Secretary, who is not a judicial officer, is to revise it. He is a judicial officer only in the sense in which every executive officer is, who, in the discharge of his duty, is bound to exercise his judgment and discretion.

Let it be admitted, for the sake of the argument, that the position of the claimant is correct, and that Congress were bound by the article of the treaty to constitute a court of record for the purpose of establishing the injuries which had been suffered, and that intended by the act of 1823 to constitute such a court as the law required. Admitting all this, still the question recurs, have they intended what they intended? To this we must answer, that they have *quod voluerunt, non dixerunt*. We must still look to the act creating the tribunal, in order to understand its nature and character.

"Certainly," as is said in the case of *Ferreira*, "the tribunal acts under the law of Congress, and derives all its authority from it, cannot call in question the validity of its provisions, nor exercise absolute and final power for its decisions, when the law, by which the decisions are made, declares that they shall not be subject to his reversal, but subordinate to that of the Secretary of the Treasury, and subject to his reversal."

We have referred to the case of the *United States vs. Ferreira*, 13 *W. R.*, 40. Of the decision in that case, we desire to remark that the reasoning of the court, so far as we have had occasion to quote it, speaks for itself, and satisfies our judgment. For our present pur-

*dicta*. It is urged that the decision is legal authority only to show that the court had no jurisdiction, that being the question before the court. It follows, then, that even if it should be necessary to demonstrate the truth of certain propositions, in order to show *why* the court had no jurisdiction, no statement by the court of any principle, however deliberate and well considered, is entitled to any weight. It follows, also, that the reasoning of the court by which they are led to the conclusion is always to be rejected as authority, and the conclusion only is to be adopted. Such a position, we apprehend, is entirely at variance with the practice of the courts and of the bar in England and America. It is not uncommon, and it is often highly beneficial, for courts to determine the material point in a case upon one, two, or three grounds. It is by no means the understanding of the legal profession that, because in such a case the court might have settled the question upon one ground, therefore the opinion of the court upon the other grounds is to be regarded as extrajudicial. In the case of *Ferreira*, whether the court might or might not have reached their conclusion by a different process of reasoning from that which they adopted, we cannot assent to the position that the reasoning which they used is to be regarded as extrajudicial.

We do not think that we can look beyond the acts of Congress which authorize the territorial judge and the Secretary of the Treasury to investigate and pass upon these claims. Under the treaty alone, without an act of Congress, no tribunal would be authorized to act. If we say that the Secretary has no power to revise the doings of the judge, where are we to stop? The result would be, and that is the effect of the argument, that for all substantial purposes he is to take the decision of the judge as final and conclusive upon him. This might be very proper if Congress had seen fit so to enact. But it seems to us that the act gives him an authority as substantial, as difficult to be ignored or lost sight of, as that which it gives to the judge. Whether the act does in reality carry out the treaty is not the question before us. It may or may not accomplish the object intended, but, perfect or imperfect, it is the only basis on which this claim rests, so far as any judicial action or quasi-judicial action is concerned. We cannot make the law, but must take it as we find it existing. We can perceive no legitimate mode of avoiding the conclusion, that the merits of this claim were to be submitted to the Secretary of the Treasury for his decision, and that such decision upon the justice and equity of the claim was final, and that he had a right to reduce the amount reported by the judge, either by striking off the interest, or a part of the principal, or both of them.

With these views it is unnecessary for us to consider the question whether the word "satisfaction" in the treaty entitles the claimant to interest, or whether the mode provided by the act of Congress for the settlement of the claim is such a "process of law" as the treaty contemplates, and our opinion is, that the claimant has established no cause of action against the United States.

At the same time I am willing to state that the inclination of my mind is, to agree with the views expressed by Judge Scarborough, in his dissenting opinion, in relation to the meaning and effect of the

word "satisfaction" in the treaty. The reason why I have not expressed my views on that point in this opinion is, because it appeared to me that the decision of this case must be governed by the acts of Congress rather than by the stipulations of the treaty.

LETITIA HUMPHREYS, ADMINISTRATRIX OF ANDREW  
ATKINSON, DECEASED,

vs.

THE UNITED STATES.

SCARBURGH, J., dissented.

My former convictions being rather strengthened than weakened by the reconsideration of this case, I am under the necessity of again dissenting from the judgment of the court. In the opinion which I delivered at the hearing of this case, I set forth very much at large the grounds on which it is founded, and should now content myself with mere reference to it for the reasons on which my present dissent is based, but for the consideration that the opinion now delivered by the majority of the court turns mainly on one of the points which I discussed at some length in my former opinion, and a becoming respect for my brethren requires that I should briefly state why I do not concur in their views.

In my former opinion, I adopted as sound and correct the following propositions:

I. That this case is embraced by the ninth article of the treaty.

II. That by the ninth article the United States stipulated to provide a *judicial* tribunal before which the injuries therein contemplated should be established.

III. That the United States, in stipulating that they would cause satisfaction to be made for those injuries, undertook to pay the sufferers, not only the actual value of the property lost, but interest on each value, by way of damages, for the loss of the use of the property, from the time the injury was committed.

IV. That upon the judicial establishment of the injury, the United States became absolutely and unconditionally bound to pay its pecuniary value thereby ascertained, to wit: *the amount* of the judgment.

V. That by the acts of 1823 and 1834 provision was made by Congress to carry the ninth article of the treaty into effect, in accordance with these views. And—

VI. That the judgment on which the present claim was founded, having been rendered by a competent tribunal, the injury complained of was thereby judicially established, and, thereupon, the United States became bound by the faith of treaties as well as by the judgment itself to render full satisfaction therefor.

And hence I deduced the conclusion that the petitioner is entitled to relief.

The judgment of the court now to be entered rests, as I understand it, entirely upon the ground that the acts of 1823 and 1834 invested the Secretary of the Treasury with the power of revising and correcting, at his discretion, the decision of the judge; and that the action of the Secretary of the Treasury thereon is final and conclusive. But I understand the presiding judge to state for himself that the inclination of his mind is to agree with the views expressed in my former opinion in relation to the meaning and effect of the word "satisfaction" in the treaty. Such being his opinion, a majority of the court at least concur in saying that the petitioner has not received all that she is entitled to; and if this be true—and that it is, it seems to me, cannot be successfully controverted—the result must be that she will lose her claim, not because it is not justly due her, but for some other reason, which excuses the United States from liability, but does not satisfy the debt!

There can be no doubt that it was the duty of Congress, in the enactment of a law to carry the ninth article of the treaty into effect, to provide (1) a tribunal before which the injuries contemplated by it might be established; and (2) that when established, due satisfaction thereof should be made. And to my mind it is equally clear that the tribunal contemplated by the treaty is a judicial tribunal. The first of these objects is provided for in the first section of the act of 1823, and the second section of that act provides for the second object. That the first section, if it stood alone, does abundantly provide for the first object, and constitute a judicial tribunal for its accomplishment, has never been, and cannot be controverted. It is clear beyond dispute. The words used not only warrant, but require such a construction. By its full force and effect are given to each word, and each word is understood according to its ordinary meaning. And not only is this true, but a different construction would be opposed to the ideas of Congress in the enactment of the law, and wrest their words to a meaning contrary to their intention. It is, I respectfully submit, because due attention has not been paid to this view of the subject, that undue weight has been given to the words "just and equitable" in the second section, and an erroneous construction of the whole law has been adopted. Whilst it is strenuously insisted that those words must be interpreted in their strongest and most latitudinous sense, it seems to be forgotten that the effect must be to put upon the words of the first section a construction which they do not naturally bear, and thereby defeat the professed object of the act. And this, strange as it may seem, is done under the erroneous impression—I state it with the most deferential respect for those who differ from me—that it is rendered necessary by that sound rule of construction which requires a statute to be so construed that, if it can be prevented, no clause, sentence, or word, shall be superfluous, void, or insignificant; (6 Bac. Ab., 380;) whilst, in truth, it results in a direct violation of that rule, for it not only perverts, but sets aside the plain words of the first section of the act. It disregards, too, another rule, equally sound and equally philosophical, which requires that, in determining the meaning of the words, *all* the parts of the statute are to be compared, considered, and construed, with reference to each other. One part of a

must be so construed by another, that the whole may, if possible: *ut res magis valeat, quam pereat*. Hence general words restrained, and clauses controlled by clauses; and hence the law, not only of reason and justice, but of law, that the words "just and equitable" are to be construed with reference to their context and their relation to other words, and to the object of the

It may not be improper, in this connexion, to suggest that the second section is merely subsidiary to the first, and hence, so far as it is allowed to control it, must, if necessary, yield to the first.

The object of the first section is to establish the injury and the obligation of the United States to satisfy it, whilst the second was designed merely to carry this object into effect. The first is the judgment; the second, the execution.

It seems to be considered that inasmuch as the words "just and equitable" have a definite meaning, they must confer upon the Secretary of the Treasury the power of revising the decision of the judge. The view of the subject, I most respectfully suggest, is based upon an erroneous assumption that, under it, a sense is attached to those words different from that which is given them in the construction I have adopted. The only difference between the two constructions, in this respect, is to be found in the application of those

In the one, they are applied to the injury complained of, and understood to devolve upon the Secretary of the Treasury the power of deciding whether such injury be "just and equitable;" in the other, they are applied to the decision of the judge, and understood to be merely directory to the Secretary of the Treasury. The former has no reference to the treaty, and considers the words "just and equitable" as having no connexion with the question whether the claim comes within the provisions of the treaty. The latter regards the due execution of the treaty as the great object of the statute, and the paramount consideration in its construction. It is upon the idea that all the parts of the statute were designed to harmonize with each other, and that one and the same spirit reigned throughout the statute; and in applying the words "just and equitable" to the decision of the judge, instead of the original injury, it is not only to the spirit and intention, but to the very letter of the statute; for no one disputes that the literal meaning of the language refers the words "just and equitable" to the decision of the judge, and the spirit and intention of the statute are too plain to admit of question. In a word, the former subverts, whilst the latter preserves, the treaty.

The difference between these two applications of the words "just and equitable" is sufficiently obvious. The treaty provides that compensation shall be made for the injuries which shall be judicially established. Upon the judicial establishment of the injury, therefore, compensation is due. In the nature of things, as well as in law, the fact is the only evidence which can be adduced of the judicial establishment of the injury; in other words, it is the only competent evidence of itself. The first section of the act of 1823 provides a tribunal and invests it with the power of judicially establishing the in-

A judgment of that tribunal in a proper case, therefore,

establishes the injury, and such a judgment is "just and equitable," within the provisions of the treaty, for it is, in justice and equity, precisely such a judgment as the treaty contemplates, and such a judgment as is entitled to satisfaction. In determining, then, whether the *decision* of the judge is "just and equitable, within the provisions of the treaty," the simple inquiry is, was it made by the proper judge in a proper case? But whether the *injury* complained of is "just and equitable" is altogether a different question. Still, the terms themselves are, in both instances, used in the same sense. In what sense they are *definite* I have heretofore considered.

It would be easy to show, too, that the words "just and equitable" are as superfluous under the one construction as under the other. But this, it seems to me, is a circumstance of but little importance. Words of this kind are often used where, if they were stricken out, the sense would not be materially affected by it. We often find in the most solemn instruments, drawn with a studious reference to precision and accuracy, words which are mere expletives, or used to give emphasis to other words. The seventh section of the first article of the Constitution of the United States is as follows: "But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of *each* house, *respectively*." The word "respectively" might be obliterated without changing the meaning of the section; and yet can it be said that no meaning is attached to it? The tenth section of the same article reads: "No State shall \* \* unless *actually* invaded." It would be difficult to conceive of an invasion which was not *actual*, or of a State *invaded*, which was not *actually* invaded; but would it ever occur to any lawyer that, in the construction of this section, no meaning is to be given to the word "actually?" Other instances, without number, might be given, but these are sufficient for my present purpose. I have purposely taken them from the Constitution of the United States, because that instrument is of the gravest character, and was framed by men of distinguished learning and ability, with a cautious reference to accuracy and precision of language.

To sustain the construction which gives to the words "just and equitable" the effect of conferring on the Secretary of the Treasury the power to revise the decision of the judge, it is necessary to insert the word "and," so that the statute may read "just and equitable, *and* within the provisions of the treaty." But it is the duty of all courts to confine themselves to the words of the legislature; *nothing adding thereto, nothing diminishing*.—(Per Tindal, C. J., in *Everett vs. Mills*, 4 Scott, N. C., 531.) The general rule certainly is, that words cannot be inserted; and the only exception to it, of which I am aware, is, that to effectuate the intention, words obviously intended to be inserted may be considered as inserted, where it is but *expressio eorum quæ tacitè insunt*. But the insertion of the word "and" in this case, so far from being obviously intended, would defeat the expressed object and intent of the statute. It seems to me, therefore, that the construction which renders the question whether the decision of the judge is "just and equitable" distinct from the question whether it is

within the provisions of the treaty," so as to require the Secretary of the Treasury to consider (1) whether the claim is "just and equitable" without reference to the treaty, and (2) whether it is "within the provisions of the treaty," cannot be sustained. In this respect the statute presents but a single point for the consideration of the Secretary of the Treasury: whether the decision of the judge is "just and equitable," within the provisions of the treaty? And this is the same thing as the question, is the decision of the judge "just and equitable," considered with reference to the treaty—"just and equitable" in the sense of the treaty?

In the enactment of the statute of 1823 there was no question in the minds of Congress as to the relative capacity or fitness of the Judges of Florida and the Secretary of the Treasury to perform the duties to be created by it, or as to the relative trust-worthiness of these officers. The matter which then addressed itself to the consideration of Congress was, how best to carry the treaty into effect—whether this or that duty was the more easy or the more difficult. They are not to be presumed to have conferred a judicial duty on the Secretary of the Treasury, for the plain and obvious reason that they could not have done so consistently with either the treaty or the Constitution of the United States. And here was abundant reason why the power of revising the decision of the judge might not as properly have been given to the Secretary of the Treasury as the power of determining whether a case reported to him was properly authenticated for payment. And, moreover, both these questions are equally questions of law. In a given case, the facts being proved, there is no longer any question of fact; and if anything remains to be decided, it must, of necessity, be a question of law.

Under the act of 1823 the Secretary of the Treasury has no power to revise and re-examine the decision of the judge on any point. His authority is simply to pay money, and he is merely vested with a discretion in determining when a proper case for the exercise of that authority is presented to him. He is to pay, on being *satisfied*, &c. The validity of the judge's decision is not made to depend on the decision of the Secretary of the Treasury. The decision may be valid, whether he is *satisfied*, &c., or not. He can decide nothing conclusively. He is a merely executive officer, and judicial duties cannot be conferred upon him. A discretion being given him by the act, his duty under it is, therefore, *executive*, and not *ministerial*; but it is mere discretion, and not the power, judicially to decide. It is, that he may be *satisfied*, not that the right may be *settled*. The legal effect is, that, however erroneously he may act, if his discretion is honestly exercised, he will be excused from personal responsibility; and this is the whole legal effect of his rejecting a claim or any part of it. The judgment still stands in full vigor, and the obligation to satisfy it remains unimpaired and undischarged. His powers are analogous to those of a sheriff under an execution. The latter must determine for himself, whether the execution was issued upon a judgment rendered by a court of competent jurisdiction. If it was, then he can justify his action under it; but if it was not, and he acts under it, he is a trespasser. The only difference is, that the sheriff acts at



his peril, whilst the Secretary of the Treasury is vested with a discretion, and is bound only to an honest exercise of it. But the validity of the judgment in either case is in no way affected by the action of the officer called on to execute it. An erroneous rejection of a judge's decision by the Secretary of the Treasury, therefore, does not change its character, or relieve the United States from the obligation to satisfy it. It remains against them a debt under the treaty—an injury *established by process of law*—notwithstanding its rejection by the paying officer. He is excused, because he acted honestly; but nevertheless *satisfaction* still remains to be made.

Under the act of 1834 the Secretary of the Treasury has no power to decide whether a claim is "just." The power given him under the first section of that act is merely to pay the amount awarded by the judge in all cases where the decision of the judge is deemed by the Secretary of the Treasury "to be just." There is, I believe, no difference of opinion between me and my brother judges, that the acts of 1823 and 1834 are *in pari materia*, and to be construed together as constituting one system. We concur, I believe, in the opinion that the injuries of 1812 and 1813 are within the treaty, and that the word "just" in the act of 1834 is to receive the same interpretation as the words "just and equitable" in the act of 1823. But this is a matter of but little importance, as this case was presented under the *second* section of the act of 1834, and the only provision for its satisfaction is made by the second section of the act of 1823. The construction of the word "just" in the first section of the act of 1834 is immaterial here.

In my former opinion I endeavored to show why the whole evidence was to be reported, and on that I now content myself with referring to what I then said.

It is impossible so to construe the second section of the act of 1823 as to refer the words "the amount thereof" to the decision of the judge, *as modified by the action of the Secretary of the Treasury*, without inserting therein the words "as modified by the action of the Secretary of the Treasury." We have already seen that words can only be considered as inserted when they are *necessarily* implied—when they were *obviously* intended to be inserted. In any other case, the introduction of qualifying words in the interpretation of a statute would, in the language of Lord Denman, (in *Lamond vs. Eiffe*, 3 Queens B. R., 910,) be "a great reproach to the law." Now, when it is considered that, without the insertion of these words, the words "just and equitable" could not be so interpreted as to confer upon the Secretary of the Treasury the power to revise the decision of the judge; that such an interpretation of them renders the act of 1823 violative of the very treaty which it professes to carry into effect; and that their insertion will, therefore, defeat the expressed object of the act, I submit that it cannot be either just or proper to insert them. I repeat here what I said in my former opinion: "A case which will justify such a liberty for such a purpose, I venture most respectfully to affirm, cannot be found in the annals of jurisprudence."

I have not seen it anywhere insisted that, because the terms "pro-

cess of law," in the English original, and the words "justifiquen legalmente," (translated—"judicially prove according to law") in the Spanish original, of the treaty, mean the judgment of a judicial court, or of a judicial magistrate; *any* mode of ascertaining the amount of the injuries which might be adopted *must* be judicial. The argument on this point is, that the words "process of law" mean the judgment of a judicial court, or of a judicial magistrate; that the act of 1823, which was professedly passed to carry the ninth article of the treaty into effect, confers upon the judges of the superior courts of Florida, respectively, the power of adjudging the claims arising within their respective jurisdictions, *agreeably* to the provisions of the ninth article of the treaty; that this power is, in its nature judicial, and conferred on judicial officers by their judicial titles and in their official characters to be exercised judicially; that the language used is appropriate to this purpose; and that, therefore, the tribunal invested with this power is a judicial tribunal, and its decisions judicial judgments, by which the claims adjudged by it were either judicially established or judicially rejected. This argument, it seems to me, is sound and correct, in both its premises and conclusions.

I adhere to my former opinion.

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IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

R E P O R T .

*To the honorable the Senate and House of Representatives of the United States in Congress assembled :*

The Court of Claims respectfully presents the following documents as the report in the case of

ROBERT S. GARNETT *vs.* THE UNITED STATES.

1. The petition of the claimant.
  2. Letter of Deputy Solicitor to the Paymaster General, his reply, and copies of letters therein referred to, transmitted to the House of Representatives.
  3. Claimant's brief.
  4. Solicitor's brief.
  5. Opinion of the Court, refusing an order to take testimony.
- By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857.

SAML. H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

*To the honorable the Judges of the Court of Claims :*

The petition of Robert S. Garnett respectfully shows : That he is a major in the army of the United States ; that for the period of time intervening between the 29th of June, in the year 1846, and the 31st of January, in the year 1849, he did, under a regular appointment, fill the place and perform the duties of aid-de-camp to Major General Zachary Taylor. During that period he was a lieutenant.

And your petitioner further shows unto your honors, that by the sixth section of the act of Congress approved January 11, 1812, and entitled "An act to raise an additional military force," it is enacted "that aids-de-camp to majors general shall be entitled \* \* \* to four

rations;" and that by the twelfth section of an act of Congress approved the 24th of April, 1816, entitled "An act for organizing the general staff, and making further provisions for the army of the United States," it is enacted "that one additional ration be allowed to all subaltern officers of the army."

And your petitioner further shows unto your honors, that at the time of the passage of the act of 1812, "subalterns of the army were allowed but two rations, and at that time, and at the time the act of 1816 was passed, aids-de-camp were required to be selected from that grade of officers, and that, consequently, aids-de-camp are entitled to receive the rations granted to them by the act of 1812, and the additional ration granted to "subaltern officers of the army" by the act of 1816.

And your petitioner further shows, that by an act approved the 2d of March, 1827, "each captain and subaltern in the army shall be allowed one additional ration," with this proviso, "that no subaltern in the performance of staff duty, for which he receives extra compensation, shall be entitled to the additional ration herein provided for;" that in consequence of this proviso, aids-de-camp do not claim the additional ration allowed by this act; but that the former acts above mentioned have no such provisos, and are accompanied by no such restrictions or distinctions.

Your petitioner therefore claims to be entitled to the additional ration granted by the act of 1816, to "subaltern officers of the army," for his services as aid-de-camp to General Taylor, as above mentioned, during the time he so served, and which has hitherto been refused to him, and to obtain which he prays the judgment of this court, and so, as in duty bound, he will ever pray, &c.

R. S. GARNETT.

STATE OF VIRGINIA, }  
County of *Elizabeth City*, } to wit.

Before the undersigned, a justice of the peace in and for the county aforesaid in the State of Virginia, personally came Robert S. Garnett, and made oath that the matters, facts, and things set forth and contained in the foregoing petition are true to the best of his knowledge and belief. Given under my hand this 4th day of August, 1855.

FAYETTE JONES, *J. P.* [SEAL.]

STATE OF VIRGINIA, }  
*Elizabeth City County*, } to wit.

I, Samuel S. Howard, clerk of the county in the county and State aforesaid, do certify that Fayette Jones, whose name is signed to the writing above, is a justice of the peace in and for said county, legally authorized to administer oaths and take acknowledgments, and that I verily believe his signature above is genuine.

Given under my hand and the seal of said court, this 4th [SEAL.] day of August, 1855.

S. S. HOWARD, *Clerk.*

## IN THE COURT OF CLAIMS.

ROBERT S. GARNETT, }  
                   *vs.* } No. 244.  
 THE UNITED STATES. }

*Petitioner's brief.*

The petitioner claims the additional ration allowed to "to all subaltern officers of the army," by the twelfth section of the act of 24th April 1816—from the 29th of June, 1846, to the 31st of January, 1849, while he was aid-de-camp to Major General Zachary Taylor.

The aid of a major general must be selected from the subalterns of the line.

The act of January 11, 1812, 2d Statutes at Large, 671, section six, enacts that the aids to major generals "shall be entitled to twenty-four dollars monthly in addition to their pay in the line, and ten dollars monthly for forage, and four rations." The act of March 3, 1815, 3d Statutes at Large, 224—the first act passed after the act of January 11, 1812—"fixing the military peace establishment of the United States," at section third, enacts that the "aids-de-camp" of major generals shall be selected from "*subalterns of the line.*"

The act of March 2, 1821, 3d Statutes at Large, 615—"An act to reduce and fix the military peace establishment of the United States;" and by which the number of major generals is reduced—at section five, enacts, that the "aids-de-camp" shall be selected from the *subalterns of the line.*

Under these acts it is evident that "aids-de-camp" to major generals must have been selected from the grade of *subalterns of the line.*

The act of June 18, 1846, 9th Stat., 17, cited in the solicitor's brief, is merely temporary, being supplemental to an act "providing for the prosecution of the war with Mexico;" and, by its first section, provides for the reduction of appointments made under it to the military peace establishment, fixed by the acts of 1815 and 1821, upon the conclusion of peace. Even were this otherwise, the claimant was appointed aid on the 29th of June, 1846, when both General Taylor and himself were in Mexico, long before the army there could have been advised of the passage of an act which had been approved only eleven days before. The conclusion, then, is inevitable, that, under the old acts, "fixing and reducing, and fixing the military peace establishment," the claimant being "a subaltern of the line," was appointed "aid-de-camp" to Major General Taylor.

Being a subaltern, he is entitled to all the allowances belonging to that grade, unless otherwise provided by law.

While the act of 1815 was in full force, which required that all aids to major generals should be selected from the grade of subalterns, an act was passed (see act 24th April, 1816, 3 Stat., 297) by the 12th section of which "one additional ration was allowed to all subaltern officers of the army."

This ration being allowed to all subalterns, without any reference to their service, to wit, whether it is rendered in the line or upon the



staff, it is claimed that the aids to major generals, being by law required to be of the grade of subalterns of the line, come within its purview, and are entitled to all of its benefits.

It is contended by the government that this last ration is given to the subalterns in addition to their rations *as subalterns*; that the act of January 11, 1812, fixes the rations of aids to major generals at four, and that it is not the intention of this act of 1816 to alter the allowances to aids in any way.

If this reasoning be correct, it makes the subsequent legislation on the subject of rations simply ridiculous. In 1827 an act was passed (see act of March 2, 1827, 4 Stat., 227) entitled "An act giving further compensation to captains and subalterns of the army in certain cases," the first section of which allowed to each subaltern of the army "one additional ration," and the second section of which provided "that no subaltern officer who should be in the performance of any staff duty for which he received any extra compensation should be entitled to the additional ration therein provided for." If the act of 1812 fixed the compensation of aids (staff officers) in the contemplation of the legislature, why add this proviso? If it was intended that "aids-de-camp" to major generals should neither be allowed the ration provided by the act just cited, (March 2, 1827,) nor that allowed by the act of 1816, why incorporate into one a proviso which expresses this intention, and leave the other without any such proviso?

Again, the government seems at last to desert its position, that the act of 1812 fixes the rations of the aid at four, and resorts to an ingenious arrangement of the subaltern's rations, which reaches exactly the same result. But the acts of Congress are direct and explicit, and the allowances of rations are made unprovisionally until the act of 1827.

It is evident, from all the legislation on the subject, that it was, and has been, the intention of Congress from the first to give a higher rate of compensation and greater allowances to officers serving in the capacity of aids to major generals than to those serving in the line. When the act of January 11, 1812, was passed subalterns received but two rations. The 6th section of this act gave to aids of major generals *four*. When the act of 1815 fixed the peace establishment this allowance was continued to *aids*, and it was enacted that they should be selected from *subalterns*, and that when the subaltern became an aid he received additional or increased allowances. This state of things no longer exists, if the position taken by the government at this time be correct. By the acts of 1816 and 1827 the rations of the subaltern have been raised to *four*, while by the reasoning now adopted the rations of aids to major generals remain as they were in 1812, and are therefore just the same in amount, to wit, *four*. So that, in fact, the spirit of the act of 1812 has been defeated by subsequent legislation, and the subaltern who formerly had his allowance of rations increased by being promoted to fill the rank of aid to a major general has them continued to him just as they were before his promotion, and this, too, notwithstanding the act of 1821 (3 Stat., 615) by its 5th section imposes additional duties upon him.

The true spirit of the legislation seems to be this: The act of 1812

gave the aid four rations, he having while subaltern only two ; the act of 1816 added one to the rations of each, making those of the subaltern, when aid, five ; when in the line three ; the act of 1827 increased the rations, but by its proviso declared that the subaltern, when upon the staff, should not receive this increase, thereby leaving his rations, when aid, where the other laws had placed them.

After the argument of this case, the court desiring to be advised as to the practice of the Department of War, under these different laws, requested the Solicitor to file with the papers of the case some official evidence as to what that practice was. The letter of the Paymaster General of June 16 is filed by the Solicitor in conformity with that request.

This letter, in the first place, corrects an error in the pay table, as contained in the Army Register for 1857 ; then states that the mistaken entry in the Register was probably designed to those that aids-de-camp, to major generals did not, like those of brigadiers, come within the meaning of the proviso of the act of 1827 ; and lastly, that the allowance to aids of major generals is fixed by the act of 30th May, 1796, and 11th January, 1812 ; and under the opinion of the Comptroller, already filed, the allowance has not been affected by subsequent legislation.

The act of 1827, sec. 2, or rather the proviso thereto, could not possibly be more general in its terms ; no subaltern officer in the performance of staff duty, for which he receives an extra compensation, can be allowed the ration therein provided. Aids to major generals have never claimed it. It is not easy to discover how the department finds authority to make a distinction under this act between the aids of major and brigadier generals. They are both "staff duties," for which "extra compensation is received," and are unquestionably both within the meaning of the proviso.

But it is not with the interpretation of the law by the government that we have to do, but with the practice under it. And neither the letter of the Paymaster General, nor the fact, bears the Solicitor out in his statement made in the brief, as to the "contemporaneous construction, and the construction ever since" the passage of the act of 1812 of that law.\* The letter of the Paymaster General refers for this practice to the opinion of the Comptroller, made at a comparatively recent date, in the case of Kearney, and nothing is said as to whether this decision has not been protested against by the officers affected by it. The fact, as far as it can be ascertained, being, that such protests have been made. It will be borne in mind, too, that the army has but one major general since the act of 1821, consequently, the number of these aids must be very small, and it could hardly be fair to interpret their acquiescence in a department decision as an abandonment, on their part, of any claim they might have against that decision.

The contemporaneous construction of the act of January 11, 1812, was that the four rations therein granted to aids to major generals, were to be in addition to their rations in the line, and general officers

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\* My remark applies not to the act of 1812, but to the act of 1816, under which the claim is made.—(See Comptroller's letter of December 30, 1850.)—JOHN D. MCPHERRSON, *Deputy Solicitor*

were to be paid. This was done up to a late date in 1815, or early in 1816, as will be seen by reference to voucher No. 2,128, in the account of Paymaster Robert Brent, December, 1815, Second Auditor's office. I am informed at the Paymaster General's office, that in this case, and the case of Lieutenant Richard Henry Lee, the question was first raised, and after argument it was settled that these rations were not to be considered additional.

This was before the act of 1816—under which the claimant makes his claim. He appeals to this Court from the decision and regulation of the department made thereunder. And to this, the only court of appeal open to him, he brings this decision for revision, places his case upon the acts of Congress, and asks a decision. It will be hard if he is to be concluded in the court of appeal by any decision of the court below.

W. B. WEBB,  
*Petitioner's Attorney.*



IN THE COURT OF CLAIMS. No. 244.

ROBERT S. GARNETT *vs.* THE UNITED STATES.

*Brief of United States Solicitor.*

The act of March 16, 1802, sec. 5, (2 Stat., 132,) gave a lieutenant two rations per day.

The act of January 11, 1812, sec. 6, (2 Stat., 671,) gave the aid-de-camp of a major general four rations per day.

It has never been claimed by any one, nor is it claimed now by the petitioner, that an aid, being a subaltern, was entitled to both rates of allowance, two rations as subaltern, and four as aid, making six in all. On the contrary, the construction has always been that the officer could take only in one capacity as aid or as subaltern.

The act of April 24, 1816, sec. 12, (3 Stat., 297,) allowed "one additional ration" "to all subaltern officers of the army."

It is claimed in this petition that a subaltern officer of the army, being a major general's aid, and, as such, drawing four rations under the act of 1812, is entitled under the act of 1816 to draw one ration in addition to the four, making five in all.

The contemporaneous construction was, and the construction ever since has been, that the aid could receive only his four rations under the act of 1812; that the additional ration given to the subaltern was in addition to those which had already been given to him *as subaltern*, not in addition to those which had been given to him *as aid*.

If then an aid, being a subaltern officer, and drawing four rations *as aid*, cannot claim the two rations given to every subaltern by the act of 1812, on what ground does he claim the one additional ration

given to every subaltern by the act of 1816? The argument rests upon the fact, that "when the act of 1816 was passed all aids were subalterns." The answer to this, however, is the same that would be given if the aid claimed the two original rations under the act of 1812, viz: that the entire rations of the aid shall not exceed four, this being implied in the act giving him four rations; and that the act giving the additional ration to all subalterns is to be construed, like the act giving two rations to all subalterns, as being subject to the condition that the subaltern may waive his right to them, and does waive his right to them, by taking a staff appointment, which entitles him to a specific and higher rate of allowance. Or the act of 1812 may be construed, as it seems to be understood by the pay department, as giving to the aid such number of rations, in addition to those due to his line rank, as will make the whole number up to four.

It is alleged in the petition, that when the act of January 11, 1812, was passed, all aids were by law subalterns. This is an error. By the act of March 3, 1799, sec. (1 Stat., 749,) a major general's aid might be a captain, and when the rank of major general was abolished, the aid of a brigadier, by the act of March 16, 1802, sec. 3, might be a captain. When the rank of major general was restored by the act of January 11, 1812, above cited, he was not restricted to any rank in the selection of his aid. The restriction to subalterns was made by the act of March 3, 1815, sec. 5, (3 Stat., 224,) and was removed by the acts of June 18, 1846, sec. 8, (9 Stat., p. 18,) before the petitioner was appointed aid. So far then as the argument for petitioner may rest upon the proposition that "all aids were subalterns," the answer is, that this was an accident—that the proposition is not universally true of aids, and that therefore conclusions based upon it cannot be universally true.

The act of 1816 increased the allowance of the subaltern by one ration. An act of March 2, 1827, (4 Stat., 227,) gave to every subaltern not in the receipt of extra compensation for staff duty one additional ration. Thus the subaltern was entitled certainly to three rations, and conditionally to four. A subaltern acting as commissary, and receiving therefor \$20 per month extra compensation, could draw but three rations; acting as aid to a major general, and receiving therefor \$24 per month, he could have drawn but three rations, had not the act itself provided that he should have four.

If Lieutenant Garnett was drawing his four rations when appointed aid, the effect of that staff appointment, carrying with it \$24 per month extra compensation, was to take away the ration given by the act of 1827, leaving him three under the acts of 1802 and 1816, but entitling him at the same time to four rations, it made good the one ration which it rendered him incapable of receiving under the act of 1827. Thus it may be said that Lieutenant Garnett, being an aid, was entitled to two rations under the act of 1802, one additional ration under the act of 1815, and one more to complete his allowance as aid; or that he relinquished all other allowance than that of aid, and drew the four rations in that capacity.

JNO. D. McPHERSON,  
*Deputy Solicitor.*



IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

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The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled :*

The Court of Claims respectfully presents the following documents as the report in the case of

ROBERT S. GARNETT *vs.* THE UNITED STATES.

1. The petition of the claimant.
  2. Letter of Deputy Solicitor to the Paymaster General, his reply, and copies of letters therein referred to, transmitted to the House of Representatives.
  3. Claimant's brief.
  4. Solicitor's brief.
  5. Opinion of the Court, refusing an order to take testimony.
- By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the  
[L. s.] seal of said Court, at Washington, this seventh day of December, A. D. 1857.

SAML. H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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*To the honorable the Judges of the Court of Claims :*

The petition of Robert S. Garnett respectfully shows : That he is a major in the army of the United States ; that for the period of time intervening between the 29th of June, in the year 1846, and the 31st of January, in the year 1849, he did, under a regular appointment, fill the place and perform the duties of aid-de-camp to Major General Zachary Taylor. During that period he was a lieutenant.

And your petitioner further shows unto your honors, that by the sixth section of the act of Congress approved January 11, 1812, and entitled "An act to raise an additional military force," it is enacted "that aids-de-camp to majors general shall be entitled \* \* \* to four

Stokely, who died intestate on or about the — day of —, A. D. 1792, and in consideration of certain resolves of Congress hereinafter named.

And your petitioners further represent unto this honorable Court, that the said Nehemiah Stokely was commissioned by Congress a captain in the 8th Pennsylvania regiment in the continental service in the revolutionary war, and served as such until the close, or until reduced or retired. That, by a resolution of Congress of October 21, 1780, it was provided that the officers who should continue in the service to the end of the war should be entitled to half pay during life, to commence from the time of their reduction; and by a subsequent resolution of Congress of March 22, 1783, it was further provided that officers then in service, and that should continue therein to the end of the war, should be entitled to receive the amount of five years' full pay in money, or securities on interest at six per cent. per annum, as Congress should find most convenient, instead of half-pay promised for life by the resolution of 21st of October, 1780. That, by a resolution of Congress of March 8, 1785, it was further provided that the officers who retired under the resolve of the 31st of December, 1781, are equally entitled to the half-pay or commutation with those officers who retired under the resolve of the 3d and 21st of October, 1780.

And your petitioners further represent and show to this Court, that the commutation, or half-pay, provided for in either of the foregoing resolves of Congress, has never been paid, but remains as a claim due to the said children of the said captain.

And your petitioners further state and aver that the said claim has been before Congress, for its action, in 1848, 1st session of 30th Congress; and House report No. 617, accompanied by bill 496, in favor of said claim, with interest. Also, 1st session of 33d Congress, 1854, further action was had, and by House report No. 144, accompanied by bill No. 359, in favor of the commutation and interest, and finally referred to the Court of Claims on the 3d day of March, 1855, which proceedings and report are filed in this court, and will be referred to as a part of this case.

Your petitioners therefore pray that this honorable Court will examine into the justice and equity of the said claim, and report a bill to Congress providing for the payment thereof, together with the interest thereon, unto the heirs or legal representatives of the said officer, or such other order or bill as to your honors shall seem fit and proper to report in the premises.

And your petitioners, as in duty bound, will ever pray.

HORATIO N. GILBERT,

*Agent for Claimants.*

Dated 14th May, A. D. 1856.

DISTRICT OF COLUMBIA, }  
County of Washington. } ss.

H. N. Gilbert, of Washington, in the county of Washington, in the District of Columbia, being duly sworn, doth depose and say, that

the petition above by him subscribed, contains the truth according to the best of his information and belief.

H. N. GILBERT.

Sworn and subscribed before me this 14th day of May, A. D. 1856.

C. W. C. DUNNINGTON,  
*Justice of the Peace.*

IN COURT OF CLAIMS.

JOSEPH STOKELY AND POLLY FINDLEY, CLAIMANTS *vs.* THE UNITED STATES.

*Claimant's brief and points.*

1. The claim is founded upon a law of Congress. The consideration was for services in part executed, and to be continued to the end of the war; and the consideration of the contract being complied with by the officer, the obligation to enforce the law now rests with Congress.—(See resolution of Congress, May 15, 1778, Mayo & Moulton's "Pension and Bounty Lands," 3; resolution of August 24, 1780, ib. 6; resolution October 21, 1780, ib. 7; resolution March 22, 1783, §2, ib. 9; resolution March 8, 1785, ib. 10.) ib. in the introduction, pages xxi. xlii.

2. The obligation is acknowledged by repeated precedents on the part of Congress.—(See Captain Gibson & Lieutenant Price's case in October, for the relief of, March 2, 1833, Mayo and Moulton, 180; Lieutenant Wilson's case, act February 27, 1833, his heirs allowed seven years' half-pay, with interest, per resolution of Congress August 24, 1780; ib. 175.)

Doctor Axson's case, act June 15, 1832; commutation with interest, ib. 163.

Captain McDuff's case, act April 2, 1830, section 2; land given him, the same as to other captains in the continental line, ib. 148.

Lieutenant Jacob's case, act July 14, 1832; commutation and interest allowed him, ib. 167.

Colonel Harrison and Thomas Davenport's cases, act July 14, 1832; commutation and interest allowed to heirs, ib. 168.

Colonel Thornton's case, act February 9, 1833; commutation and interest to administrators, one-fourth to widow, and residue distributed to persons entitled according to the laws of Virginia, ib. 173.

John Thomas and Peter Foster's cases, act March 2, 1833; commutation and interest as officers, ib. 178.

Richard Henley courts case, act March 2, 1833; commutation to his widow and interest, ib. 178.

Captain Triplit's case, act March 2, 1833; commutation and interest, ib. 179.

C. K. AVERILL,  
*Attorney for Claimant.*



IN THE COURT OF CLAIMS.—No. 600.

HEIRS OF NEHEMIAH STOKELY *vs.* THE UNITED STATES.*Brief of the United States Solicitor.*

The petitioners claim commutation, or half-pay for life, due their ancestor as captain in continental service during the war of the revolution.

1. This claim is barred by limitation under the resolutions of 1785 and 1787 and act of February 2, 1792, (1 Stat., 301,) yet as it has been favorably reported three times by committees of the House of Representatives, and the tendency of Congress is to overlook the limitation in these cases, it may be proper to make some remarks on the evidence.

2. Half-pay for life was first promised by resolutions of October, 1780, and only to those who then were, or should thereafter be, in service.

Captain Stokely was in service from 1776 to the early part of 1779, when he became supernumerary, as is admitted on the part of the petitioner, and was entitled to one year's pay, under resolution of November 24, 1778, which, it is presumed, he received. He afterwards raised and commanded a militia company under the State of Pennsylvania, from June 1, to October 4, 1779. This is all the service that is stated or referred to by any witness or by any record. If there was before the committee such evidence as warranted their report, that it appears from the deposition and from the certificate of the auditor general of Pennsylvania "that Captain Stokely, during the whole or a greater part of the time from 1779, till the close of the war, was actually engaged in active service, having enlisted and commanded one or more companies for the protection of the northern frontier," I am unable to find it now. Possibly the committees have mistaken the dates in the settlements of his accounts for the dates of his service.

Under the revolutionary pension acts an application was made to the Pension Office by the children of Captain Stokely for arrears of pension due his widow, and several witnesses testified to his service. Their depositions have been offered in evidence by petitioner. Among these was James Chambers, who lived near Mrs. Stokely before her marriage. He proves the marriage in 1779, and mentions the militia service, and says, that shortly after the marriage Captain Stokely went to reside at his wife's place, and resided there till his death in 1792. He kept public house there from April, 1780, till April, 1781. He was living there when Chambers was carried off a prisoner, in June, 1781, and Chambers found him in the same place when he came back from captivity in January, 1783. Chambers was examined twice on the part of the claimants, testified at length and minutely.—(See his two affidavits among the papers from the Pension Office.) Here is positive testimony to show that he was not in service after 1779, that is, that he did not come within the resolution of October, 1780.

The 13th volume of Colonial Records, cited for petitioner, makes

against his case. At page 427 money is shown to have been remitted him for pay of Westmoreland county rangers, (militia,) for which he was to account. At page 527 it is shown that the comptroller had settled his account, and that the money was for the pay of "Captain Joseph Stokely's company of rangers in Westmoreland county." The service of this Captain Joseph has no doubt elsewhere been placed to the credit of Captain Nehemiah.

It is said in argument that the supernumeraries were bound to return to service when called upon, and that Stokely returned to service when he commanded the militia company. No authority is cited for the position taken, and I find none to sustain it. If it were correct, still service in the State militia would not entitle him to the benefits of the act of Congress.

Some reliance appears to be placed upon the fact that Stokely was returned as entitled to donation lands, and appended to the copy of that return is a certificate of Daniel Sturgeon, (probably given when he was senator from Pennsylvania,) stating that none had donation lands unless they served to the end of the war. An act of Pennsylvania, declaring who are entitled to donation lands, was passed March 27, 1785, (2 Laws, p. 290,) and includes supernumeraries under resolutions of 1780, and certain militia officers, as well as those who served to the end of the war, though the returns give him land as of the Pennsylvania line. This, however, is not evidence. If Pennsylvania admitted his service as entitling him to land, the evidence which proved it then should be produced now. The States were liberal in their grants of land, and it is submitted that the United States should not be bound by their admissions. No rule of law requires it, nor would it be safe to adopt such a principle.

JOHN D. McPHERSON,  
*Deputy Solicitor Court of Claims.*

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#### JOSEPH STOCKELY ET AL. vs. THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This claim is presented by the heirs-at-law of Nehemiah Stokely, who is alleged to have been a captain in the army of the revolution. It should have been prosecuted by the administrator of Stokely; but we shall at present examine the case in relation to the statutes of limitation.

The following facts are stated in the petition: Nehemiah Stokely died in the year 1792. He was commissioned by Congress a captain in the 8th Pennsylvania regiment, in the continental service, in the war of the revolution, and served as such until the end of the war, or until he was reduced or retired. By the resolution of Congress of October 21, 1780, it was provided that the officers who should continue in service to the end of the war should be entitled to half-pay during life, to commence from the time of their reduction. By the resolution of March 22, 1783, it was provided that officers then in service, and who should continue therein until the end of the war,

should be entitled to receive the amount of five years' full pay in money, or securities on interest at six per cent. per annum, as Congress should find most convenient, instead of the half-pay promised for life by the resolution of October 21, 1780. By the resolution of March 8, 1785, it was provided that the officers who retired under the resolve of December 31, 1780, are equally entitled to the half-pay or commutation with those officers who retired under the resolve of the 3d and 21st of October, 1780. The petitioner states that neither the half-pay nor commutation provided for in the foregoing resolves has ever been paid, but remain still due, and that the claim was presented to Congress in the year 1848.

The question in this case is, whether the claim is not barred by the resolutions and statutes of limitations. We have already made two decisions upon this point: one in the case of *Chamberlin vs. The United States*, and the other in the case of *Marnay vs. The United States*. This case is identical in this particular with those two cases, and as the resolutions and statutes upon this subject were stated at length in the opinions delivered in those two cases, it is unnecessary now to recapitulate them. It is not alleged or proved that the claim in this case was presented at the treasury before the 1st day of May, 1794. In accordance with the decisions in the cases mentioned, this claim is now barred by the statute of limitations, and the claimant has no cause of action against the United States.





IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

E. B. CHAMBERLAIN AND OTHERS *vs.* THE UNITED STATES.

1. The petition of the claimants.
2. Evidence submitted by the claimants and transmitted to the House of Representatives.
3. Claimants' brief.
4. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.

SAML. H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

*To the honorable the Judges of the United States Court of Claims:*

The petition of E. B. Chamberlain and other heirs of Captain Joshua Chamberlain, late of the States of Massachusetts and New York, respectfully represents: That their ancestor, the said Joshua, a soldier of the revolution, in the United States service in the Massachusetts line, enlisted in 1777 for three years, as a private in Captain Miller's company and Colonel Vose's regiment; served according to enlistment, and was discharged in April, 1780; and after a brief visit

to his family, he re-enlisted "for the war," having been promoted to a captaincy, and served in that capacity till the close of hostilities.

That the records, both at Boston and Washington city, give evidence of the first term of service; but the rolls from 1780 to the close of the war are very defective. It is, however, alleged and shown by reliable testimony that Captain Chamberlain continued in the service of his country, as captain, till the close of the war; that he was known, acknowledged, and called as such by his neighbors and acquaintances till his death, and his commission often seen and read.

That Captain Chamberlain's long continuance in the army, and consequent neglect of his private affairs, caused him and his family great embarrassment, and ultimate loss of his farm; and he died in poverty in 1812, and his widow in 1816, leaving their children poor, and without having asked or received the half-pay granted by resolutions of Congress, adopted October, 1780, and bounty land, September, 1776. But that after his death, and the passage of the acts of 1818, 1828, and 1832, his heirs, your petitioners, believing they had a right, took steps to obtain something for his services. But finding the rolls so defective as to produce great delay, they were finally induced to apply to Congress, as a court of equity, to remedy the defect of the rolls, and afford that relief not exactly afforded by the *strict* letter of the law.

That the first application in the case was made to the War Department in 1838, but, owing to a deficiency in testimony of service, an adverse report was made. It was again presented in both Houses of Congress at the beginning of the 1st session of the 33d Congress, and referred to the Committee on Revolutionary Claims in each House; and on the 22d of May, 1854, additional proof of service was presented in the Senate; and on the 14th June following, Mr. Cooper, from said committee, made a favorable report, (S. No. 303,) accompanied by a bill (S. No. 398) for relief, which was passed to a second reading; and upon the 16th of June said bill was read a third time, and passed *unanimously*; and it was "*Ordered*, That the secretary request the concurrence of the House of Representatives therein."—See Senate Journal, 1st session 33d Congress, pages 63, 402, 433, and 440.

But in the House of Representatives, on the 2d of August, 1854, the Senate bill (No. 398) was laid upon the table, and an adverse report made by Mr. Peckham, from the Committee on Revolutionary Claims.—(See Report House of Reps., No. 349.) And on the 30th of December, 1854, in the House of Representatives, it was "*ordered*" that the Senate bill No. 398, entitled "An act for the relief of the heirs of Captain Joshua Chamberlain, deceased," (heretofore laid upon the table,) be referred to the Committee on Revolutionary Claims; and that on the 23d of February, 1855, "Mr. Peckham, from the aforesaid committee, to whom was referred the bill from the Senate, No. 398, entitled 'An act for the relief of the heirs of Captain Joshua Chamberlain, deceased,' reported back the same without amendment."—(See House Journal, 2d session 33d Congress, of the various dates referred to.) This "Act" (S. No. 398) was then placed upon the calendar, and committed to the Committee of the Whole House, but was never reached, as Congress adjourned a few days thereafter.

Hence, your petitioners respectfully ask that your honorable Court will confirm the action of Congress as shown by the aforesaid report, (S. No. 303,) and the act (S. No. 398) hereto annexed, marked exhibit A, and prayed to be taken as part of this petition, as showing all the proof and facts of the case briefly, and afford your petitioners all other relief warranted by the circumstances and the various acts of Congress upon the subject; and your petitioners will, as in duty bound, ever pray.

E. B. CHAMBERLAIN,  
*For himself and other heirs of Captain J. Chamberlain.*

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STATE OF OHIO, }  
*Ashtabula County,* } *to wit.*

Be it remembered that upon this 14th day of November, 1855, E. B. Chamberlain, of said county, personally appeared before me, a justice of the peace in and for the State and county aforesaid, signed the foregoing petition, and made oath, in due form of law, that the statements made therein are true to the best of his knowledge and belief, and that no part of the said claim has been assigned away. I also certify that the said Chamberlain is a minister of the Gospel in good standing, and a man of the strictest integrity.

Given under my hand and seal.

CALVIN C. WICK, *J. P.* [SEAL.]

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STATE OF OHIO, }  
*Ashtabula County,* } *to wit.*

I hereby certify that Calvin C. Wick, esq., before whom the foregoing affidavit was made, and who has hereunto subscribed his name, was, at the time of so doing, a justice of the peace in and for the county aforesaid, duly commissioned and sworn.

In testimony whereof, I have hereunto set my hand and affixed the [L. S.] seal of the court of common pleas of said county this 15th day of November, one thousand eight hundred and fifty-five.

A. KELLOGG,  
*Clerk Court of Common Pleas of said county.*

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THE UNITED STATES COURT OF CLAIMS.

BRIEF IN THE CASE OF

THE HEIRS OF CAPTAIN JOSHUA CHAMBERLAIN, DECEASED,

*vs.*

THE UNITED STATES.

The petitioners, the aforesaid heirs, claim bounty land under the resolutions of Congress of September, 1776, and half-pay for life



under that of the 21st October, 1780, for the revolutionary services of their ancestor, Captain Joshua Chamberlain.

They also claim not only all benefit arising from the above mentioned resolutions of Congress, but of all subsequent additional and explanatory acts of Congress, referring especially to those of 1818, 1820, 1828, and 1832.

The army rolls do not furnish as conclusive testimony in support of this claim for bounty land and half-pay for life as could be wished ; but it is believed to come as near the requisitions of the law, and the rules and regulations established by the Pension Bureau, in reference thereto, as can well be done by parol evidence, and sufficiently near to support the claim upon principles of equity and justice.

The rules and regulations of the Pension Bureau established from time to time, and hereto annexed for reference, declare "that every applicant shall produce the best proof in his power. This is the original discharge or commission ; but if neither of these can be obtained, the party will so state under oath, and will then procure, if possible, the testimony of at least one credible witness, stating in detail his personal knowledge of the services of the applicant, and such circumstances connected therewith as may throw light upon the transaction." If such surviving witness cannot be found, then those rules make other provisions for the failure, and great reliance is placed upon traditionary evidence and circumstances.

In Captain Chamberlain's case, neither his commission nor discharge can be found ; but parole evidence is furnished of the existence, at one time, of the former by a witness who had frequently seen and read it. Captain Chamberlain's name is found upon the rolls, and proof is furnished therefrom of his three years' service as a private soldier in the Massachusetts line, in Captain Miller's company, and Colonel Vose's regiment ; but the rolls do not show that he served as captain ; nor is this so remarkable, as history shows that there are no rolls extant, in the departments in Washington city, of the State lines, except those of Virginia.

The testimony, however, of several witnesses proves that he served as captain, and one (Straight) proves positively that he saw him in the army about the close of the war ; and the petition, alleging all the facts, is sworn to by one of the heirs, who is shown to be "a minister of the Gospel in good standing, and a man of the strictest integrity."

Exhibit A, annexed to the petition, is referred to to show all the testimony in detail.

It has never been the practice of our government to exact the production of commissions and discharges too rigidly in support of claims for revolutionary pensions, nor to enforce the rules of evidence too stringently, as will be seen by reference to the opinion of the Secretary of War, General Cass, of January 15, 1833, in which he says : "Service in a military grade, which is usually held under a commission, even though the party never received one, or it did not date back to the commencement of his service, entitles to the pension of that grade."

Nor has it been the usage of the government or Congress to exclude

all applicants for pensions, under the various resolutions and acts of Congress, who could not produce evidence of service in *exact* conformity with the *strict* letter of the law, as will be seen by reference to the rules and regulations of the Pension Bureau, relaxed and amended from time to time, and by the various special acts of Congress, granting pensions in many cases in which the applicants had failed to establish their claims before the Pension Office; and in conformity with this practice, and in illustration thereof, the opinion of the Attorney General, dated the 3d February, 1834, is referred to, which says: "The acts of 1828 and 1832 are rather to be regarded as the acknowledgment of a debt equitably due to the soldiers of the revolution than as conferring gratuitous pensions."

The reason may be asked, why Captain Chamberlain made no application for half-pay and bounty land during his life. It is well known that at that early period it was by no means so common for revolutionary officers and soldiers to make such applications, being regarded as derogatory, if not dishonorable, and understood to be clogged with certain conditions relative to pecuniary circumstances and destitution, as to prevent many of those who had struggled through all the deprivations of the revolution from exposing their poverty and want; for the act of Congress of 1818 places the pension upon the pensioner's "reduced circumstances in life, and need of assistance from his country for support;" and that of 1820, supplementary to the former, made "it the duty of the Secretary of War to cause to be struck from the list of pensioners the names of such persons as shall not be, in his opinion, in such circumstances as to be unable to support themselves without the assistance of their country."

Had Captain Chamberlain lived to a more auspicious period—till the time of the passage of the acts of 1828 and 1832, &c.—he would certainly have made application; but as he died in 1812, and his widow in 1816, no application was made until 1838, and then, owing to a deficiency in proof of service, an adverse report was made. The claim was again presented in both Houses of Congress at the beginning of the first session of the thirty-third Congress, and referred to the Committee of Revolutionary Claims in each House; and on the 22d of May, 1854, additional proof of service was presented in the Senate; and on the 15th of June following, Mr. Cooper, from said committee, made a favorable report, (S. No. 303,) accompanied by a bill (S. No. 398) for relief, which was passed to a second reading; and upon the 16th of June said bill was read a third time and passed *unanimously*; and it was "*Ordered*, That the Secretary request the concurrence of the House of Representatives therein."—(See Senate Journal, 1st session 33d Congress, pp. 63, 402, 433, and 440.)

But in the House of Representatives, on the 2d of August, 1854, the Senate bill (No. 398) was laid upon the table, and an adverse report made by Mr. Peckham, from the Committee on Revolutionary Claims.—(See Rep. House Reps., No. 349.) And on the 30th of December, 1854, in the House of Representatives, it was "*ordered*" that the Senate bill, No. 398, entitled "An act for relief of the heirs of Captain Joshua Chamberlain, deceased," (heretofore laid upon the

table,) be referred to the Committee upon Revolutionary Claims; and that on the 23d of February, 1855, "Mr. Peckham, from the aforesaid committee, to whom was referred the bill from the Senate, No. 398, entitled 'An act for the relief of the heirs of Captain Joshua Chamberlain, deceased,' reported back the same without amendment."—(See House Journal, 2d session 33d Congress, of the various dates referred to.) This "act" (S. No. 398) was then placed upon the calendar, and committed to the Committee of the Whole House, but was never reached, as Congress adjourned a few days thereafter.

Thus it is seen, by reference to the journals of Congress, that the Senate passed "an act unanimously for the benefit and relief of the heirs of Captain Joshua Chamberlain, deceased;" and although an adverse report was made thereon at one time by the Committee on Revolutionary Claims in the House of Representatives, to whom it was referred, yet it is very apparent that all objections must have been afterwards withdrawn in the committee, as the same "act" was reported back by the committee without amendment, and by the same member thereof who made the adverse report, Mr. Peckham, its chairman, and placed upon the calendar of the whole House; and it is but reasonable to suppose, that if there had been sufficient time, it would have passed the House, and become a law. It is, therefore, hoped that the honorable Court of Claims will also decide in favor of the petitioners.

S. L. LEWIS,  
*For Claimants.*

#### E. B. CHAMBERLAIN AND OTHERS *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

This petition is presented by E. B. Chamberlain, who appears for himself and other heirs of Joshua Chamberlain, late a captain in the army of the revolution. It is stated in the opinion that in or about the month of April, 1780, he enlisted into the army "for the war;" having been promoted to a captaincy and served in that capacity to the close of hostilities. Captain Chamberlain died in the year 1812, and the claim now made is for the half-pay of a captain from the end of the war to the period of Captain Chamberlain's death. It is stated in the petition that Captain Chamberlain died without having asked or received the half-pay granted by the resolution of Congress, of October, 1780.

Admitting the services to have been performed as alleged, the first question which arises is: whether the claim is barred by any act or resolution of Congress.

On the 2d day of November, 1785, Congress passed the following resolution:

"*Resolved*, That all persons having claims for services performed in the military department be directed to exhibit the same for liquidation to the commissioners of army accounts on or before the first day of August ensuing the date hereof, and that all claims under the description above mentioned, which may be exhibited after that period

shall forever thereafter be precluded from adjustment or allowance ; and that the commissioner of army accounts give public notice of this resolve in all the States for the term of six months."

On the 23d of July, 1787, the following resolution was passed :

" *Resolved*, That all persons having unliquidated claims against the United States, pertaining to the late commissary's, quartermaster's, hospital, clothier's, or marine department, shall exhibit particular abstracts of such claims to the proper commissioner appointed to settle the accounts of those departments, within eight months from the date hereof ; and all persons having other unliquidated claims against the United States shall exhibit a particular abstract thereof to the Comptroller of the Treasury of the United States within one year from the date hereof ; and all accounts not exhibited as aforesaid shall be precluded from settlement or allowance."

The 1st section of the act of March 27, 1792, (1 Stat. 245,) enacted that the operation of the foregoing resolutions, "so far as they have barred, or may be construed to bar, the claims of any officer, soldier, artificer, sailor, or marine, of the late army or navy of the United States, for personal services rendered to the United States, in the military or naval departments, shall, from and after the passing of this act, be suspended for and during the term of two years ; and that every such officer, soldier, artificer, sailor, or marine, having claims for services rendered to the United States in the military or naval departments, who shall exhibit the same for liquidation at the treasury of the United States at any time during the said term of two years, shall be entitled to an adjustment or allowance thereof on the same principles as if the same had been exhibited within the term prescribed by the aforesaid resolutions of Congress."

The 1st section of the act of February 12, 1793, (1 Stat., 301,) enacts, "that all claims upon the United States for services or supplies, or for other cause, matter, or thing, furnished or done previous to the 4th day of March, 1789, whether founded upon certificates or other written documents from public officers, or otherwise, which have not already been barred by any act of limitation, and which shall not be presented at the treasury before the 1st day of May, 1794, shall forever after be barred and precluded from settlement or allowance."

The claim, in this case, is for personal services rendered to the United States, in the military department, and was barred by not having been exhibited at the treasury by the 27th day of March, 1794, according to the provision in the 1st section of the act of March 27, 1792. It is also barred by the 1st section of the act of February 12, 1793, by not having been presented at the treasury before the 1st day of May, 1794, as it is a claim upon the United States for services, and by this section it would be barred, even if it had not already been barred by the act of 1792.

In the brief of the counsel for the claimants, the reason why Captain Chamberlain made no application for half-pay during his life is stated to be, that at that early period it was considered derogatory to make such an application. However proper might be the feeling which might actuate a person to decline presenting a claim, it certainly affords no reason for avoiding the bar of the statute of limita-

tions. At the time of his death, in the year 1812, Captain Chamberlain had no claim for half-pay against the United States which could be sanctioned by a court of law, or which could descend to his heirs or be prosecuted to judgment by his administrators, if one existed, and we are of opinion that upon this ground the claimants have no cause of action.

The petitioners also pray that a warrant be issued to them for such bounty land as they are entitled to in virtue of the services of their ancestor.

The resolution of Congress of September 16, 1776, provided for granting lands to persons who should engage in the service and continue therein until the close of the war, or until discharged by Congress; the share of a captain being three hundred acres.

The resolution of September 18, 1776, extended this bounty to those who should enlist for the term of during the war.

By the 2d section of an act approved April 26, 1802, (2 Stat., 151) it was made the duty of the Secretary of War to receive claims to land for military services until the 1st day of January, 1803, and no longer.

By the act of April 15, 1806, (2 Stat., 378,) the time for issuing military land warrants was extended to the 1st day of March, 1806.

By the act of March 21, 1808, (2 Stat., 477,) this time was further extended to the 1st day of March, 1810.

By the act of December 19, 1809, (2 Stat., 555,) it was further extended to the 1st day of March, 1813.

By the act of July 5, 1813, (3 Stat., 3,) the Secretary of War was authorized to issue military land warrants to such persons as should produce satisfactory evidence of their claims before the 1st day of March, 1816.

By the act of April 16, 1816, (3 Stat., 284,) this time was extended to the 1st day of March, 1818.

By the act of March 9, 1818 (3 Stat., 408,) this time was extended to the 1st day of March, 1819.

By the 2d section of the act of February 24, 1819, (3 Stat., 481) this time was further extended to the 4th day of March, 1821.

By the act of March 2, 1821, (3 Stat., 617,) this time was extended to the 4th day of March, 1823.

By the act of May 26, 1824, (4 Stat., 60,) the time limited by the act of February 4, 1819, was extended to the 26th day of May, 1824.

By the act of March 3, 1823, (3 Stat., 776,) this time was extended to the 4th day of March, 1825.

By the act of March 3, 1825, (4 Stat., 133,) the time was further extended to the 4th day of March, 1827.

By act of March 2, 1827, (4 Stat., 219,) the time was further extended to the 4th day of March, 1830.

By act of July 13, 1832, (4 Stat., 578,) the time was further extended to the 1st of January, 1835.

By the act of January 27, 1835, (4 Stat., 749,) the time was extended to May 26, 1839.

By another act of the same date, (4 Stat., 479,) the time was extended to the 1st of January, 1840.

It would seem that the two last acts cover nearly the same period of time.

By the second section of the act of July 27, 1842, (5 Stat., 497,) the time was extended to the 27th of July, 1847.

By the act of June 26, 1848, (9 Stat., 240,) the time was further extended to the 26th of June, 1853.

By the act of February 8, 1854, (10 Stat., 267,) the time was further extended to the 26th of June, 1858.

It has appeared necessary to us to state the various acts bearing upon this question, in order to show that the Secretary of the Interior, to whom the duties of the Secretary of War in relation to this matter have been transferred by the 6th section of the act of March 3, 1849, (9 Stat., 395,) is now authorized to issue military revolutionary land warrants to such persons as shall produce to him satisfactory evidence of the validity of their claims. Before the Department of the Interior was constituted, the duty of issuing such land warrants devolved on the Commissioner of Pensions, subject to the supervision of the Secretary of War, as he now is to that of the Secretary of the Interior. There is, then, now existing a tribunal which has jurisdiction of applications for revolutionary bounty land warrants. Any person interested should, in the first place, apply to the Department of the Interior, and have the claim there examined.

We have forbore to express any opinion upon the merits of the claim for half-pay for life, as in our opinion it was long since barred by the statutes of limitations, which is a perfect answer to the claim. If Joshua Chamberlain was a captain in the revolutionary war, as alleged in the petition, the same evidence which would be sufficient to substantiate the claim for half-pay for life, would establish also the right to the bounty land.

We would add, also, that the claim for half-pay for life cannot be prosecuted by the heirs, but as it is personal estate, it must be enforced by the administrator. The case may be different as to the claim for bounty land, but it is unnecessary to examine that question at present.

As the case now stands, the petitioners have no cause of action against the United States.



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IN THE SENATE OF THE UNITED STATES.

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DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

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The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

STEPHEN C. PHILLIPS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief.
3. Solicitor's brief.
4. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.

SAMUEL H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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IN THE UNITED STATES COURT OF CLAIMS.

*To the Court of Claims:*

The petition of the undersigned, Stephen C. Phillips, of Salem, in the county of Essex, and commonwealth of Massachusetts, merchant, administrator of Jonathan Porter Felt, (the second of that name, late of said Salem, merchant, deceased, intestate,) claimant, respectfully represents:

That the said Felt deceased, intestate, on the thirteenth day of January, in the year eighteen hundred and forty, being at the time of his decease a citizen of, and resident at, said city of Salem, in the county and commonwealth aforesaid.



That said claimant was, on the fourth day of February, in said year eighteen hundred and forty, duly appointed, by order of the court of probate for said county of Essex, administrator as aforesaid, and on said fourth day of February accepted said trust, and was duly qualified therefor according to the laws of said commonwealth, and that said claimant still continues to be qualified to act in the capacity of administrator as aforesaid, according to the laws of said commonwealth.

That on or about the sixth day of December, in the year eighteen hundred and thirty-eight, said intestate (being then in the city of New York, in the State of New York) purchased of certain merchants, partners, doing business in said city of New York, under the name and style of Munsell & Lawrence, a certain quantity of goods, to wit: five cases or bales, containing in the whole one thousand seven hundred and fifty-seven Manilla hats, of the value of two thousand six hundred and thirty-five dollars and fifty cents, the same having been imported into the United States on or about the seventeenth day of July, in the year eighteen hundred and thirty-eight, from the port of Manilla, and duly entered, according to the laws of the United States, at the custom-house in said port of New York, in the district of the city of New York, a port of entry according to law for goods imported from said port of Manilla; and that a certain sum of money, to wit: the sum of five hundred and forty-five dollars and ninety-four cents, (\$545 94,) was, on the seventeenth day of July, in said year eighteen hundred and thirty-eight, paid to the collector of said port of New York by said Munsell & Lawrence, the importers of said goods, as and for the duties on said goods; said sum being the whole amount of money due to the United States, according to the revenue laws thereof, on said goods, or by reason of the importation thereof.

That the said intestate, on or about the thirteenth day of January, in the year eighteen hundred and forty, being then in said city of New York, shipped and caused the said goods to be put on board the steamboat "Lexington," so called, bound from said city of New York to the port of Stonington, in the State of Connecticut, said intestate fully intending and purposing then and thereby to transport said goods to the port of Salem, in the district of Salem and Beverly, in the State of Massachusetts, and from said port of Salem, whence, by the laws of the United States, said goods might lawfully be exported, subject to and with the benefit of drawback, to export the same to the port of Valparaiso, a port on the west coast of South America, to which, by the laws of the United States, said goods might lawfully be exported, subject to and with the benefit of drawback, the same being a foreign port not within the dominions of any foreign state immediately adjoining the United States; that said goods, at the time they were so shipped on board the Lexington, and ever since the time of their said importation, were and had remained and been in the cases in which they had been so imported, without diminution or change of the articles which were therein contained at the time of said importation, in quantity, quality, or value; that said goods were shipped on board said steamboat solely for the purpose and with the intention aforesaid; that said goods were duly entered at said port of

New York for exportation from said port of Salem ; and said intestate in all respects otherwise complied with all the provisions of the laws of the United States regulating the exportation of goods, with the benefit of drawback, from a port other than the port of original importation, and received from the collector and the naval officer of said district of the city of New York a coastwise certificate in the form for such case prescribed by law. That said steamboat "Lexington" sailed from said port of New York for said port of Stonington on the thirteenth day of January, eighteen hundred and forty, having on board said goods in the manner aforesaid, and while in the prosecution of her said voyage was wholly destroyed by fire, whereby said intestate, who was then on board said steamboat, died, and said goods and certificate were wholly lost and destroyed, said goods at the time they were so lost and destroyed being in the cases in which they were originally imported in the manner aforesaid.

Wherefore said claimant represents that he is justly entitled, in his said capacity of administrator, to the sum of eleven hundred and two dollars and eighty cents, (\$1,102 80,) being the amount of the drawback to which said intestate would have been entitled had said goods arrived at said port of Salem and exported therefrom, in pursuance of the intention aforesaid, with interest thereon.

And said claimant further represents that, on the twenty-first day of December, in the year eighteen hundred and forty, during the 2d session of the 26th Congress of the United States, a petition to Congress in his name and behalf as administrator aforesaid was presented by Mr. Saltonstall, of Massachusetts, in the House of Representatives, praying the allowance of his said claim and the enactment of a law for the payment of the amount thereof out of the treasury of the United States ; that said petition was referred by the House to its Committee on Commerce, all of which appears of record in the journal of said House for the 2d session of the 26th Congress, pages 86 and 87 ; that said committee, (as appears by said journal, page 156,) on the 7th day of January, in the year 1841, by Mr. Curtis submitted to said House the following report:

"The object of the petitioner is to obtain relief for the heirs of the said deceased, by an appropriation from the treasury of \$545 94, the amount of duties paid into the custom-house of New York upon five bales of Manilla straw hats, which were imported into New York from Manilla in 1838, and after remaining for some time in the hands of the original consignees, were by them sold to the said deceased, and by his order were shipped coastwise, on board the steamboat Lexington, and were totally destroyed by the conflagration of the said steamboat in Long Island Sound on the 13th January, 1839. It is proved that the said goods were entitled to debenture, (a duplicate copy of the coastwise certificate having been produced by the petitioner,) and that they had been actually sold for exportation, and at the time of their destruction were in the course of shipment, coastwise, for the purpose of being reshipped at Salem, on board a vessel about sailing for the port of Valparaiso. It is further proved that the said goods were not intended to be used in this country, but were of a description adapted solely to the markets upon the west coast of South

America ; that such goods are in all cases imported to be again sold for export ; and that no revenue has accrued from their use or consumption.

"These facts, which have been fully proved, present one of the most unexceptionable cases of a claim for the refunding of duties that can be claimed or granted ; and the committee accordingly report a bill for the relief of the petitioner."

That said report is to be found recorded in the "reports of committees, 2d session, 26th Congress" report No. 77 ; that said committee, with their report, reported to the said House a bill entitled "A bill for the relief of the legal representatives of J. Porter Felt, deceased ;" the same being numbered "bill No. (584,)" that said bill was thereupon on said 7th day of January read a first and second time and committed to the Committee of the Whole House, all of which appears by said journal, page 156 ; that neither said Committee of the Whole House nor said House ever took any further action on said bill ; that the prayer of said petition has never been granted, and that neither he, said claimant, nor any other person in his name or behalf has ever received the amount of said claim or any part thereof ; and said claimant further represents that he is informed that on the eleventh day of September, in the year eighteen hundred and fifty-two, Jonathan Porter Felt, of Salem aforesaid, the father and next of kin of the said intestate, requested the Hon. Thomas Corwin, then Secretary of the Treasury of the United States, to pay to him, said Felt, the amount of said claim ; and said claimant is further informed and believes that said Secretary did not comply with the said request of the said Felt, but refused so to do by his letter dated September 15, 1852 ; that said claimant is further informed that on the thirty-first day of December, in the year eighteen hundred and fifty-four, the said Felt, by letter of that date, requested the Hon. James Guthrie, then Secretary of the Treasury of the United States, to pay the amount of said claim to Charles W. Upham, of said Salem, for the use and on the behalf of said Felt, and that said Secretary did not comply with the request of said Felt, but refused so to do ; that said claimant is further informed and believes that neither the said J. Porter Felt nor any other person in his name or on his behalf, or in the name or behalf of the estate or legal representative of said intestate has ever received the amount of said claim or any part thereof. And said claimant further represents that, according to the best of his information and belief, no action, except as aforesaid, has been had on said claim, either in Congress or any of the departments.

And said claimant further represents that he is the sole owner of said claim, being entitled thereto according to the laws of the commonwealth of Massachusetts as administrator of said intestate, and that he became so entitled thereto on said fourth day of February, in the year eighteen hundred and forty, by virtue of his appointment as administrator as aforesaid ; and that Jonathan Porter Felt, of said Salem, the father of said intestate, is the only person beneficially interested therein, and that said Felt became so interested on said thirteenth day of January, in the year eighteen hundred and forty,

by reason of the decease of said intestate as aforesaid, according to the laws of said commonwealth of Massachusetts.

And said claimant further represents, that his said claim is supported by a certain law of the United States, approved on the sixteenth day of February, in the year eighteen hundred and fifty-four, entitled, "An act to extend the warehouse system by establishing private bonded warehouses, and for other purposes," and more especially by the eighth section of said act.

Wherefore said claimant prays that said claim may be allowed, and said sum of eleven hundred and two dollars and eighty cents, and lawful interest thereon, be adjudged due to him as aforesaid from the United States.

S. C. PHILLIPS, *Administrator*.

COMMONWEALTH OF MASSACHUSETTS, }  
Essex, } ss.

Personally appeared this 11th day of August, 1855, the foregoing petitioner, Stephen C. Phillips, of Salem, and made oath that all the facts set forth in said petition are, to the best of his knowledge and belief, true.

Before me :

STEPHEN H. PHILLIPS,  
*Justice of the Peace.*

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IN THE COURT OF CLAIMS.

ON THE PETITION OF STEPHEN C. PHILLIPS, ADMINISTRATOR OF JONATHAN P. FELT, Jr., DECEASED.

*Brief of the Petitioner.*

This is a claim against the United States, for a return of duties, or drawback, on five cases of Manila hats, amounting to.....	\$545 94
Interest to date of claim.....	556 86
Making in all.....	<u>1,102 80</u>

The goods were imported into New York, by Munsell & Lawrence, January 17, 1838.

By Munsell & Lawrence they were sold to Jonathan P. Felt, Jr.

By Felt they were shipped on board steamer Lexington, for Stonington, Connecticut; from there to be transported by land to Boston and Salem, Massachusetts; and from the latter place to be shipped on board barque Henry, for Valparaiso, an agreement to that effect having been made between Felt and the owners of said barque.

It is respectfully submitted that this case presents peculiar claims to the favorable consideration of this Court.

The goods are brought into this country, and duties are paid, said duties to be returned them in case the goods are re-shipped.

A purchaser buys the goods with the *bona fide* intention of re-ship-

ping them. He makes a bargain for a vessel to take them to Valparaiso, and, in strict pursuance of his design, he places them on board the Lexington, where, without fault of his, they are destroyed.

These goods had never been used or worn within the United States. They merely found there a stopping place on their way from Manilla to Valparaiso; and it is submitted that it would be wholly unjust and inequitable for the government, by the retention of the duties, to be placed in precisely the same situation as if the goods had been so used and worn, while the innocent purchaser, failing by no fault of his to carry out his design of re-shipment, must meet with a loss, corresponding with the advantage that the government gained.

The suggestion that the debenture was to have gone towards the payment of the goods, as a part of the price, is to be met by the consideration of what is understood to have been the custom of trade, in regard to goods bought on "long price," and in regard to those bought on "short price."

In the first instance, the purchaser, intending to re-ship, buys of the importer, who takes the debenture as part of the price of the goods, and when he receives it passes it to the purchaser's credit.

When, however, the goods are sold at "short price," the price having been agreed upon between the purchaser and importer, no such stipulation is made in regard to the debenture. It is understood between them that the purchaser is bound to obtain the debenture from the custom-house, and hand it over to the importer; and failing this, he becomes liable for the amount. This, however, is a matter wholly distinct from payment of the price of the goods, and the amount does not in any way form part of the bargain of Felt with Munsell & Lawrence, at "short price." Felt finds himself, when he ships the goods, at New York, in this position: He has certain goods for which he has paid, and which of course he has an insurable interest; he is also under an obligation to see that certain debenture is refunded to Munsell & Lawrence.

The goods he insures; they are lost, and he receives his insurance from the underwriters.

He is then bound to make good the amount of the debenture. This amount he pays to the importers, and now seeks to recover it back from the government.

It is suggested that in cases of this kind, frauds have sometimes been attempted. It is not intimated that there is any fraud whatever in this particular claim, and it is respectfully submitted that this case should be tried upon its merits, rather than upon those of other cases, similar perhaps in their general aspect but unlike this in their details.

STEPHEN C. PHILLIPS,

*Administrator.*

PHILLIPS & GILLIS, *his Attorney.*

IN THE COURT OF CLAIMS.—No. 180.

ON THE PETITION OF STEPHEN C. PHILLIPS, ADMINISTRATOR OF J. P.  
FELT, DECEASED.*Brief of United States Solicitor.*

This is a claim for the return of duties on five cases of Manilla hats, amounting to \$545 94. The goods were imported into New York on 17th January, 1838, by Lawrence & Munsell, and sold to Felt, by whom they were shipped on the steamer "Lexington," bound for Stonington, Connecticut, and were thence to have been transported across land to Boston and Salem, Massachusetts, but were destroyed with that vessel by fire in January, 1840. It is further satisfactorily proved that it was intended to have exported said goods to Valparaiso, and that Lawrence & Munsell, by whom the duties had been paid or secured, were to receive the debenture certificate in part payment of the price of the goods on such re-shipment, but that in consequence of the destruction of the goods no debenture certificate could be got, of course, and the money had to be paid to said Lawrence & Munsell.

This case presents no ground for relief to distinguish it in law from any other case where a citizen may lose by accident property for which he has paid. The circumstance that part of the price consisted of duties, and that he expected to get that part of it back when he shipped the goods at Salem, is not more material than that he expected to get back the balance of the purchase money at Valparaiso. The whole value was an insurable interest, and if he insured, or neglected to insure, or became his own insurer, that neglect or assumption was one with which the government had no concern. The presumption is, that the goods were insured, as that is the ordinary course of business among prudent business men whose means do not admit of their suffering a loss of the whole amount conveniently.

I do not charge anything of the sort in this case, but the fact is now notorious that the grossest frauds have been practiced on the government in obtaining restoration of duties on burnt goods by those who have already received back the amount of duties in the form of insurance. The case presents no legal claim certainly; nor is it one even appealing to the liberality of Congress, but is of a class of the most questionable kind.

M. BLAIR.

IN THE COURT OF CLAIMS.

STEPHEN C. PHILLIPS, ADMINISTRATOR OF JONATHAN  
PORTER FELT, DECEASED,

VS.

THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

This case, as stated in the petition, is in substance as follows:

The petitioner's intestate, on or about the 6th day of December, A. D. 1838, purchased of Munsell &amp; Lawrence, merchants, in the

city of New York, five cases or bales, containing 1,757 Manilla hats, of the value of \$2,635 50. These cases of hats were imported into the United States from Manilla into the port of New York on or about the 17th day of July, A. D. 1838, and the duties imposed by law thereon, amounting to the sum of \$545 94, were then paid by the importers.

On or about the 13th day of January, A. D. 1840, the petitioner's intestate shipped the goods on board the steamer Lexington, then bound for Stonington, in Connecticut, intending to transport them to the port of Salem, in the district of Salem and Beverly, in Massachusetts, and thence to export them to Valparaiso, on the west coast of South America. From the time of their importation till their shipment on board the steamer Lexington they had remained in the cases in which they were imported. They "were duly entered at said port of New York for exportation from said port of Salem; and said intestate, in all respects otherwise, complied with all the provisions of the laws of the United States regulating the exportation of goods with the benefit of drawback from a port other than the port of original importation, and received from the collector and the naval officer of said district of the city of New York a coastwise certificate, in the form for such case prescribed by law." The steamer Lexington sailed from New York for Stonington on the 13th day of January, A. D. 1840, having the goods on board, and while in the prosecution of her voyage was wholly destroyed by fire; "whereby said intestate, who was then on board said steamboat, died, and said goods and certificate were wholly lost and destroyed."

The petitioner insists that if the goods had arrived at Salem and been exported therefrom, his intestate would have been entitled to a drawback of \$——; and he now claims that he is entitled to this sum, with interest, under the 8th section of the act of Congress approved March 28, A. D. 1854.—(10 Stat. at L., pp. 270, 273, ch. 30.)

The affidavits of Henry H. Munsell and the petitioner himself, and copies of the depositions of Richard Lawrence and Jabez E. Munsell—taken to be read in the case of Jonathan P. Felt *vs.* The New Jersey Steam Navigation Company, a case pending, when those depositions were taken, in the district court of the United States for the district of Rhode Island—are the principal evidence in this case. The solicitor has waived all objection to its competency, and it, together with the other evidence on file, substantially sustains the averments of the petition.

The 8th section of the act of March 28, A. D. 1854, is prospective only in its operation, and is, therefore, inapplicable to this case. Even if it were construed to act retrospectively, still it would not embrace this case, which is not of the same character with either of the classes of cases for which it provides. It is not pretended that there is any other law under which this claim can be sustained.

We are of the opinion that the petitioner is not entitled to relief.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER, 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

DANIEL VANWINKLE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certified documents from the Post Office Department, transmitted to the House of Representatives.
3. Depositions offered by the claimant and transmitted to the House of Representatives.
4. Claimant's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.

SAML. H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

COURT OF CLAIMS.

DANIEL VANWINKLE, }  
vs. } Petition.  
THE UNITED STATES. }

*To the Honorable Court of Claims:*

The petition of Daniel Vanwinkle, of Newmarket, Ohio, respectfully represents that the government of the United States is justly indebted to your petitioner for services rendered in the transportation of the mails of the United States, in manner as follows, viz:

That in the year A. D. 1820 the Postmaster General advertised for



proposals for contracts for the transportation of the United States mail on route No. 12, from Feestown to Lebanon, and on No. 14, from Neville to West Union, all in the State of Ohio. The service to commence on the 1st day of January, 1821, and terminate on the 31st day of December, 1823, being for three years; and your petitioner made proposals to transport the mails, according to the plan specified in the advertisement, upon route No. 12 for a compensation of \$250 per annum, and upon route No. 14 for a compensation of \$310 per annum; both which proposals were accepted by the Postmaster General, and on the 1st of January, 1821, your petitioner entered upon the said service, at the yearly compensation of \$560.

Your petitioner further shows that some time in the month of February, 1821, your petitioner, with the consent of the Postmaster General, transferred to Thomas and John Kain his right to transport the mails on the whole of route No. 12, and a portion of route No. 14, and the said Thomas and John Kain were to receive for the service to be performed by them the sum of \$400 per annum, out of the aforesaid sum of \$560, and your petitioner retained a portion of the service on route No. 14, viz: from Ripley to West Union, to be performed by himself; that your petitioner did continue to transport the mails upon said portion of No. 14 until the termination of the contract; that the said Thomas and John Kain performed the service on the residue of the route No. 14 and the route No. 12, until the termination of the contract; that the said Thomas and John Kain did, as your petitioner is informed and believes, receive annually the sum of \$400, of the Post Office Department, in full payment for the services performed by them as aforesaid.

Your petitioner further shows that for the services so performed by him upon route No. 14, as aforesaid, he has not been paid, and there is now due and owing unto him, for the said service, the residue of the sum of \$560, contracted as aforesaid, to be paid to your petitioner; that is, from and after the 15th day of February, 1821, until the 31st day of December, 1823, at the rate of \$160 per annum, amounting to the sum of four hundred and sixty dollars, (\$460,) besides interest. And your petitioner is the only person interested in the claim herein specified.

Your petitioner further says he has petitioned the Postmaster General to have his services allowed and paid; and on the 24th day of March, 1856, the Postmaster General decided that in view of the length of time since the claim originated, and the imperfect evidence by which it was supported, he does not feel at liberty to order its payment.

Wherefore your petitioner says there is now due unto him, for the services aforesaid, the sum of \$460 aforesaid, which the United States ought to pay unto your petitioner; and he prays this honorable Court to grant him such relief for the same as this honorable Court may find he is legally entitled unto, to the end that the said sum of \$460, with interest thereon from December 31, 1823, may be paid to your petitioner, with his costs expended in the prosecution of this suit; and as in duty bound will ever pray.

DANIEL VANWINKLE.

STATE OF OHIO, }  
*County of Highland,* } ss.

Daniel Vanwinkle being sworn, says he has read the foregoing, and the facts stated in his petition are true, to the best of his knowledge and belief.

Sworn to before me, this the 22d day of July, 1856.

[SEAL.]

A. G. MATTHEWS,  
*Probate Judge, Highland County, Ohio.*  
 JOHN ELY,  
*Attorney for Claimant.*

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COURT OF CLAIMS.—No. 680.

DANIEL VANWINKLE }  
*vs.* } Brief of points and authorities.  
 THE UNITED STATES. }

Reference will be made to the laws which provide for the transportation of the mails, and particularly to act of April 30, 1810, (2 Stat. at Large, 592,) entitled "An act regulating the Post Office Establishment;" and the act of May 13, 1820, (5 Stat. at Large, 580,) being an act establishing certain post routes.

In behalf of the petitioner it will be contended, upon the facts set forth in the petition and the evidence, as follows, viz :

I. That in the year 1820, the Postmaster General advertised for contracts for the transportation of the mails on route No. 12, from Feestown to Lebanon, and on route No. 14, from Neville to West Union, all in the State of Ohio.

II. That the petitioner made proposals to transport the mails upon both routes for a compensation of \$250 for No. 12, and \$310 for No. 14, per annum, for three years, from January 1, 1821, to December 31, 1823, and that said proposals were accepted by the Postmaster General.

III. That the service was duly entered upon by the petitioner on the 1st of January, 1821, and was, by the petitioner and other persons under him, faithfully performed for the full term, and until the 31st of December, 1823.

IV. That, for the said services, there is now due, unpaid, and owing to the petitioner by the United States, a balance of account amounting to \$480, besides interest.

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IN THE COURT OF CLAIMS.

DANIEL VANWINKLE *vs.* THE UNITED STATES.

SCARBURGH J., delivered the opinion of the Court.

The claimant, in his petition, states the following case :

In the year 1820 the Postmaster General advertised for proposals for the transportation of the mail on route No 12, from Feestown to Lebanon, and on route No. 14, from Neville to West Union, all in

Ohio, for the term of three years, commencing on the 1st day of January, A. D. 1821. The petitioner made proposals for route No. 12, at \$250, and for route No. 14, at \$310, *per annum*. His proposals were accepted by the Postmaster General, and on the 1st day of January, A. D. 1821, he entered upon the service.

Some time in the month of February, A. D. 1821, the petitioner, with the consent of the Postmaster General, transferred to Thomas and John Kain his right to transport the mail on the whole of route No. 12 and a portion of route No. 14, and they were to receive for the service to be performed by them \$400, part of the \$560. The petitioner retained the portion of route No. 14 lying between Ripley and West Union, to be performed by himself; and he continued to transport the mail thereon until the termination of the contract. He has not been paid for this service; and now claims compensation therefor, at the rate of \$160 per annum from the 15th day of February, A. D. 1821, till the 31 day of December, A. D. 1823, with interest thereon.

Such is this case, as it is stated in the petition.

The Second Assistant Postmaster General, in a communication to Hon. J. R. Emrie, H. of R. dated March 25, A. D. 1856, a copy of which is on the file in this case, states as follows: "It is found that he (the petitioner) was the accepted bidder for route No. 12, Feestown (not Neville) to Lebanon, at \$250 a year, and No. 14, Neville to West Union, at \$310, both for three years from July 1, 1821, and that he performed service on both for six weeks, for which he was paid \$63. He then seems to have declined service on the whole of No. 12 and on a portion of No. 14, and on the 16th February, 1821, a contract was made with John and Thomas Kain, of Williamsburg, for a route formed from the two, viz: from Ripley by Bridgewater, Feestown, Bethel, and Williamsburg, to Lebanon, at \$400 a year. This they continued to perform to December 31, 1823, and were paid in full. What disposition was made of the remaining service, that is, between Ripley and West Union, which Mr. Vanwinkle claims to have performed, cannot be ascertained from any books or papers now in the department, many of the records and documents having been lost or dispersed by fire in 1836. The evidence on which he bases his claim are papers submitted by himself in 1852, and are as follows: the affidavit of Alexander Campbell, of Ripley, that he was cognizant of the service by Vanwinkle, during the years mentioned, the post office being kept in his house; the affidavit of Samuel Glaze, late postmaster of Decatur, between Ripley and West Union, to the same purport; and a paper dated Williamsburg, July, 1835, without signature, but which the Hon. N. Barrere, in a letter to the department, February 16, 1852, states is the draft or copy of an affidavit prepared by himself to be signed by John Kain, testifying to the performance of the service by Vanwinkle. The facts in the case have been placed before the Postmaster General, but in view of the length of time since the claim originated, and the imperfect evidence by which it is supported, he does not feel at liberty to order its payment."

The depositions of Alexander Campbell and Samuel Glaze have been taken in this case. Alexander Campbell testifies, in substance, as follows: The petitioner carried the mail from Ripley to West Union

about the years 1821, 1822, and 1823. The Ripley post office was at that time kept at his house, and his son, Carey A. Campbell, was the postmaster. The petitioner performed the service on horseback from Ripley to West Union and back once a week. He cannot say how long the petitioner performed the service, but he believes for two or three years.

Samuel Glaze testified, in substance, as follows: The petitioner carried the mail from Ripley to West Union during the years 1821, 1822, and 1823, till the fourth of February, 1823, when the witness left Decatur, where, a part of the time, he was postmaster. He could not say whether the petitioner was a contractor or not, nor how long he carried the mail after the 4th day of February, 1823. He performed the service from Ripley to West Union and back once a week on horseback.

It does not appear from the evidence that the petitioner ever presented or asserted his claim before the year 1852, and no attempt is made by him to account for his neglect. In a letter addressed by him to Mr. Emrie, dated the 19th day of February, A. D. 1856, he says: "When Hon. Thomas Corwin was the representative in Congress from this district, I put this claim in his hands for adjustment, and procured, at his suggestion, all the proof of service which he considered necessary to fully establish my claim before the Postmaster General, Amos Kendall. But about the time when Mr. Corwin had expected a favorable result of the case, the post office buildings were burned, and all my papers, vouchers, &c., lost." But of this there is no proof. It is not even stated when the papers were placed in the hands of Mr. Corwin, or what those papers were; nor is his deposition taken.

The petitioner produced on the trial a paper purporting to be a settled account between him and the United States, commencing July 1, A. D. 1818, and ending February 4, A. D. 1824. This account was admitted by the assistant solicitor to be correct. In it the petitioner receives credit for carrying the mail on various routes, and for \$63, for "carrying the mail from West Union by Ripley to Lebanon, Ohio, 6 trips from 1st January, 1821, at \$10 50 per trip." It is fairly inferable from this account that as early as 1824, if not earlier, either the Postmaster General refused to pay the present claim, or it was not demanded.

It seems to us that this claim is not satisfactorily sustained by the evidence, and that the petitioner is, therefore, not entitled to relief.







IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following  
**REPORT.**

*To the Hon. the Senate and House of Representatives of the United States  
in Congress assembled :*

The Court of Claims respectfully presents the following documents  
as the report in the case of

**CHRISTIANA DENER vs. THE UNITED STATES.**

1. The petition of the claimant.
2. Documents received from the United States Pension Office, transmitted to House of Representatives.
3. Other documents offered by claimant, in evidence, transmitted to House of Representatives.
4. Claimant's brief.
5. United States Solicitor's brief.
6. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the  
[SEAL.] seal of said Court at Washington, this seventh day of December, A. D. 1857.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

UNITED STATES COURT OF CLAIMS.

CHRISTIANA DENER, }  
vs. } *Petition.*  
UNITED STATES. }

*To the honorable the Judges of the Court of Claims:*

Your petitioner, Christiana Dener, of Charleston, South Carolina, widow of George Frederick Dener, deceased, represents: That her said husband served as lieutenant of a corps of infantry, called 'German,



*Fusileers*," in the war of the revolution, a period of one year previous to the taking of said city by the British, May 12, 1780, when he was taken prisoner by the British and detained in captivity twelve months; then escaped, and served under General Francis Marion in said war, and afterwards, upon the reorganization of said German Fusileer corps, again became lieutenant of the same, and served in said capacity with said corps from September, 1782, to September, 1783, being in all a period of more than two years active service in said capacity in said war, besides twelve months imprisonment in the hands of the enemy; and, that her marriage with said Geo. F. Dener "took place before the first day of January, 1794;" and that he departed this life in the year 1795, and that she has ever since been and still is a widow.

And your petitioner represents, that if the said George F. Dener had survived the passage of the act of Congress, approved June 7, 1832, entitled "An act supplementary to the 'Act for the relief of certain surviving officers and soldiers of the revolution,'" (Stat. at Large, vol. 4, p. 529, ch. 126,) he would have been "authorized," under the first section of said act, "to receive," from the government of the United States, "the amount of his full pay in the said line, according to his rank," as said lieutenant of said corps, for said services, "such pay to commence from the 4th day of March, 1831, and continue during his natural life;" and your petitioner represents, that the amount of his said pay in said line, according to his said rank, was three hundred and twenty dollars per annum, as established by the resolutions of Congress of October 6, 1776, and May 27, 1778, fixing the arrangement of the American army, rate of pay, rank, &c., and which rate of pay, rank, &c., continued to the end of the war.—(Vide "Resolutions, laws," &c., published by Walter S. Franklin, Clerk of the House of Representatives, in compliance with the resolution of the House of Representatives of the United States of April 11, 1836, page 9.)

And your petitioner represents, that by the first section of an act of Congress, approved July 7, 1838, entitled "An act granting half-pay and pensions to certain widows," (Stat. at Large, vol. 5, p. 303, ch. 189,) she is "entitled to receive, for and during the term of five years, from the fourth day of March, 1836, the annuity or pension which might have been allowed to her husband in virtue of said act," of June 7, 1832, "if living at the time it was passed." And your petitioner represents, that by the first section of an act of Congress, approved March 3, 1843, entitled "An act granting a pension to certain revolutionary soldiers," (Stat. at Large, vol. 5, p. 647, ch. 102;) by the first section of an act of Congress, approved June 17, 1844, entitled "An act to continue the pensions of certain widows," (Stat. at Large, vol. 5, p. 680, ch. 102;) and by the first section of an act of Congress, approved February 2, 1848, entitled "An act making further provisions for surviving widows of the soldiers of the revolution," (Stat. at Large, vol. 9, p. 210, ch. 7,) she is "entitled to receive," from the government of the United States, "for and during her natural life, from and after the 4th day of March, 1843, the annuity or pension which might have been allowed to her husband in virtue of said act (of 7th June, 1832,) if living at the time it was

passed." But your petitioner has, in fact, received but \$236 65 per annum under said acts of July 7, 1838, March 3, 1843, June 17, 1844, and February 2, 1848, to wit:

Under act of 7th July, 1838, five years' pension, at the rate of \$236 65 per annum, from 4th March 3, 1836.....	\$1,183 25
One year's pension, under act of March 3, 1843, from 4th March, 1843.....	236 65
Four years' pension, at the same rate per annum, under act of June 17, 1844, from March 4, 1844.....	946 63
Eight years' pension, under act of 2d February, 1848, at the same rate, from 4th March, 1848, to 4th March, 1856, inclusive.....	1,893 20
	<hr/> 4,259 70

which leaves a balance of fifteen hundred dollars and thirty cents, which your petitioner is entitled to receive from the government of the United States for the said services of the said George F. Dener, under the said acts of Congress of 1838, 1843, 1844, and 1848, and for the payment of which balance your petitioner prays your honorable Court to report a bill to Congress. No action has been had in Congress upon said claim, nor none in any of the departments, except that in the Department of the Interior, and which resulted in the allowance and receipt of the amount of pension as above stated, and the refusal of the government to allow more.

Your petitioner represents, that all the papers and evidence in the case upon which the above pension was granted, and upon which she confidently relies for the favorable judgment of this honorable Court, are upon file in the Pension Office and Department of the Interior, and that she is not permitted by said office or department to withdraw said papers or evidence therefrom, and she, therefore, prays this honorable Court to "make a special order, calling upon" said office or department for said papers and evidence, to be delivered to the Clerk of this Court, to be used upon the hearing and determination of this case.

Your petitioner is the sole owner and only person interested in said claim.

Respectfully submitted,

CHRISTIANA DENER.

STATE OF SOUTH CAROLINA, }  
District of Charleston, } ss.

On this third day of March, A. D. 1856, before me, G. W. Dingle, a justice of the peace within and for the district and State aforesaid, personally appears the above named Christiana Dener, and makes oath on the Holy Evangely of Almighty God that the facts set forth in the above petition are true, according to the best of her knowledge and belief.

G. W. DINGLE, J. P., [L. s.]

M. THOMPSON,  
Attorney for Petitioner.

## OFFICE COURT OF COMMON PLEAS AND GENERAL SESSIONS.

THE STATE OF SOUTH CAROLINA, }  
*Charleston District.* }

I, Daniel Horlbeck, clerk of said court, do hereby certify that G. W. Dingle, whose genuine signature appears above, is and was at the time of signing the same, a magistrate duly authorized and qualified to administer oaths and take acknowledgments; that his attestation is in due form of law; that full faith and credit are to be given thereunto; that said court is a court of record, having general jurisdiction and seal.

[SEAL.] Witness my hand and seal of court, at Charleston, this third day of March, A. D. 1856.

DANIEL HORLBECK,  
*C. G. S. C. C. P.*

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WASHINGTON, *December 15, 1851.*

SIR: I have the honor of your official communication of 25th ult., "in the case of Catharine Dener, widow of George Frederick," in which you say: "I find among them (the papers) no power of attorney appointing you to act in the matter," &c. I stand prepared to prove that I exhibited an ample power of attorney from the claimant, executed substantially in the forms prescribed by your office, and which was duly filed therein, upon which I was permitted by the proper functionaries to make a thorough examination of all the papers on file in this case, and to take a complete substantial synopsis of the evidence on file in the case, which I now have; and if that power of attorney has been mislaid in your office, and is not to be found where it perhaps should be, in juxtaposition with the papers in the case, the fault is certainly not mine; nor can I conceive with what propriety, reason, or justice, I, or the claimant, should be subjected to any delay, trouble, or inconvenience in consequence of any official mismanagement or dereliction; nor do I suppose for a moment that any will ensue. In your letter above referred to, you also say: "The papers transmitted to this office by you in the case of Catharine Dener," &c. It is not very likely that I would be entrusted with the transmission of papers in the case if I were not clothed with the authority to act "in the matter," and as an evidence (if it were wanting) of my continued sufficiently authorized agency "in the matter," and that I am not a usurper, assuming the exercise of power not properly conferred upon me, I am instructed to present herewith important additional evidence in support of the claim of Mrs. Dener.

Upon an examination of the papers on file in this case, I considered the claim clearly established by the evidence originally deduced, and found it impossible to imagine upon what ground the claim had been suspended by your predecessor; therefore, in the letter I had the honor to address you upon the subject, under date of 7th October last, I deemed it quite sufficient, at the request of the claimant, respectfully

to solicit a re-examination of the case, and to advert briefly, as I did, to a few of the most material parts of the evidence, in support of the claim, not doubting for a moment that the case would be taken up, as it were, *de novo*, without bias or prejudice growing out of the adverse decision of your predecessor, and receive that respectful, full and fair consideration and adjudication demanded by its merits and legality, and a proper discharge of official duty, in which event, I as confidently predicted the prompt issuance of a pension certificate, and so advised the claimant. But instead of this, I have been met by a reiteration of the objections raised by your predecessor, the utter unreasonableness and untenableness of which I beg most respectfully to show. But before I enter upon the body of this case, I beg leave to make a few remarks, arising out of, and applicable to, this and all similar cases.

It was doubtless the intention of Congress, in the enactment of pension laws, that the common law and equity rules, as to the sufficiency of evidence, should prevail in their execution. The converse of this proposition will not, I feel sure, be maintained by any intelligent and candid mind. It is quite too evident to admit of a doubt, that if Congress had intended that a higher standard of evidence should be required in the adjudication of this class of claims than would be sufficient to satisfy the minds of an intelligent court and jury, they would have said so. If there is any tribunal in this country, either legislative, executive, governmental, departmental, or judicial, that is not, or which should not be bound by the common law and equity rules of evidence as established, and uniformly adhered to, in every judicial tribunal, in every government making the least pretensions to freedom from the days of Justinian to the present time, I have yet to know it.

I say, if there is *any* tribunal or authority in this land of boasted liberal laws, unknown, superior to, and disregarding of the common law of England, as applicable to the particular case in question, I should like to know it, and it is time the public should know it.

Justice Story says there is no such tribunal or authority.

It is matter of judicial history that our ancestors brought with them from the mother country the common law of England, or at least so much of it as was adapted to their new condition, and that the same has been recognized and adapted by the general and all the State and territorial governments, with certain modifications. But whatever modifications may have been found necessary by our new state of things and new forms of government, that branch of England's boasted system of jurisprudence relating to evidence, especially the sufficiency of evidence, has been adopted unaltered and unmodified, in all its length and breadth, by the general and every State government, and considered of absolutely binding authority in every judicial tribunal in this broad republic. That degree of evidence which was sufficient to carry conviction to the mind of a Littleton, a Coke, a Hale, a Bacon, and a Mansfield, has ever been sufficient to satisfy the mind of a Marshall, a Kent, a Story, and a Taney; and will it not suffice for your mind; I trow it will? And, if so, the result of the present case can no longer be doubtful!

*Appropos*: Mr. Story, in one of his admirable works, after remarking generally that the courts of the United States and of the several States, as well as the State legislatures and the Congress of the United States, are bound by the common law rules of evidence, proceeds to say, *totidem verbis*: "The general rules of law and evidence applicable to common trials are interposed to prevent the party against the exercise of wanton and arbitrary power."

In the case under consideration, it is claimed that George F. Dener, of South Carolina, served as a lieutenant in the revolutionary war. In answer to this, in the report before me, you say: "The regulations require that the rank of a commissioned officer shall be established by the production of his commission, or of some other record, or documentary testimony," &c. You further say, in substance, that, "before a pension can be granted to claimant she must show by record evidence that her husband served as a lieutenant," &c. If this is a governing regulation in your department, and I am to understand therefrom that nothing short of record or documentary evidence will be sufficient to establish a claim for services as an officer, the rule or regulation strikes at the very root, and is subversive of all the above named landmarks of English and American jurisprudence. But I do not so understand it. I have also carefully examined in vain your published official regulations for the enunciation of any such a rule. You say: "The rank of a commissioned officer shall be established by the production of record evidence," &c.; doubtless it would be "established by the production of record evidence," &c. But I do not thereby so understand you, nor do I presume you would pretend to say that a parol evidence would not be sufficient to establish the same fact, in the absence of record evidence. It would not be within the prerogative of the Secretary or any other public functionary to establish any such a rule or regulation. Such a rule or regulation would be a species of executive legislation not contemplated by Congress, and at variance with the true intent and spirit of the pension laws. When Congress devolved upon the Secretary the duty of executing the pension laws, under such rules and regulations as he might prescribe, they did not expect him to adopt an arbitrary system of rules and regulations in regard to the character and degree of evidence unknown and unpracticed in judicial tribunals, and calculated to defeat the objects and ends of those laws.

They expected his rules and regulations to be merely ancillary and subordinate to the design of the laws, and be confined to the forms of application, modes of authenticating papers, &c. I say it was not the intention of Congress to confer upon the Secretary a power or authority to demolish every vestige of the law of evidence, and erect upon its ruins a utopian superstructure, or standard of evidence, far above the reach and the comprehension of ordinary minds and capacities, like the laws of a certain ancient lawgiver and tyrant, who caused his laws to be written obscurely and placed so high up in the air that but few could reach or understand them, and then punished his subjects for their violation.

Distant claimants, upon reading the pension laws, very naturally conclude that you will be satisfied with the same amount and degree

of evidence that would be sufficient to establish similar claims in a court of law or equity, and go to work, and make out their claims accordingly, and when presented, they are told by you that this will not do; that a much greater amount of evidence is requisite, and such an amount and degree of evidence as render the law, in many equally meritorious and just cases, a nullity, a species of tantalization and mockery. Thus injustice and injury is often done to honest claimants. But, whatever may be said as to the existence or non-existence of any such a rule, to the honor of your office be it spoken, but little or no attention has been paid to it, for it comes within my knowledge that it is your constant practice to admit claims, and issue pensions for services, in every grade of office, without the smallest particle of record or documentary evidence, and I can refer you, if need be, to many such cases, and several in which I have been personally admitted as attorney.

It is one of the proudest boasts of English liberty, secured by *magna charta*, extorted, it is true, by the Barons from King John, at Runnymede, in the 13th century, that the humblest citizen or subject having a claim or demand against the government or King may file his petition in the court of chancery, (by what is called a petition of right,) where the chancellor will administer right, as a matter of constitutional law, according to the rules of evidence as expounded by such luminaries of the English bar as Lord Bacon, Archibald, Phillips, and Starkie, to which I shall hereafter refer more particularly. And in all such cases, according to Chief Justice Blackstone, the chancellor is rather the counsel for the claimant than the advocate or defender of the government or King. He does not stand, *Cerberus* like, or sword in hand, as it were, at the gates of the treasury, but administers justice with a liberal hand, and is required even to give the claimant the benefit of all reasonable doubts. If he errs, he errs on the side of liberality, weakness and charity, if not absolute law and justice, and not on the side of oppression, power and patronage. If such principles as these had governed in the investigation of Mrs. Dener's claim, it would not now be my humble duty to trouble you in this form; instead of which, she would long ago have been in the enjoyment of that pittance which Congress evidently designed should be granted, without unnecessary delay, in all cases like the present.

If you will now be pleased to accompany me through an examination of the evidence (and I promise to be as brief as practicable) on file, and apply thereto the principles which, it has been seen, should govern your decision in the case, the result cannot fail to be a certificate in favor of the claimant for her husband's two years' services as lieutenant in the war of the revolution.

Christiana Dener declares that her husband, George F. Dener became a member of a light infantry corps in 1776, and served as lieutenant of said corps, in the revolutionary war, twelve months previous to the surrender of Charleston, S. C., at which time he was taken prisoner and detained in captivity twelve months—then escaped and served under Marion. Then, upon the reorganization of the German fusileer company, became lieutenant of said corps, and served therein as lieutenant from September, 1782, to September, 1783, making in all more than two years' active service, as lieutenant in the war, besides twelve

months' imprisonment in the hands of the enemy, the most humiliating and disagreeable of all situations, or services, to a brave and patriotic mind, ready to shed his blood in the cause of his country and of freedom. I need not stop to say what does not admit of a question, that a pension is as much due for the period of his imprisonment as for the most active, efficient service in the American ranks.

Her declaration is fully corroborated, for all practical purposes, by John Cart, a revolutionary pensioner, who swears positively and unequivocally, of his own personal knowledge, that said Dener served not less than two years as an officer (lieutenant) in the revolution. He says Dener was made a prisoner at the surrender of Charleston, and remained in captivity with the enemy one year; was afterwards, upon the reorganization of the German fusileer company, commissioned lieutenant, and served in that capacity, as Mrs. Dener states. When he says Dener was in service "two years or more as lieutenant," he doubtless means that he was in active service two years or more, besides the twelve months' imprisonment, for that, in the language of that day, and in common parlance, was not considered service.

Such scenes as the battles of Beaufort, Stono, and Savannah, surrender of Charleston, imprisonment, escape, &c., through which it is said Dener passed, are the best calculated of all others to make a distinct and lasting impression upon the human mind, and such scenes as render it literally impossible they should be mistaken in their testimony so long as reason retains her seat; and they are not only intelligent and respectable, but shown to be of the highest and most unimpeachable character for truth and veracity. Their testimony is also sufficiently corroborated by that of W. Nurse, Mrs. Gruber, Mrs. Godfrey, and Joseph Righton, revolutionary pensioners; and also that of John Stroble, David Horlbeck, and Edmund Cranston, herewith transmitted; all of whom, in point of character for intelligence and respectability, truth and veracity, have no superiors in South Carolina. It is the least likely thing under the sun that all, or any one of the above named persons, have sworn falsely or incorrectly in any essential particular. To attribute falsehood, false swearing, perjury, if you please, (for that it would be,) to all, or to any one of these persons, in such a case, would shock the moral sense of all who know them. It is what South Carolinians and those who know them best could never be made to believe for a moment! Nay, their feelings would revolt at the bare suggestion of a proposition involving the least degree of such an imputation. They have either sworn truly, or they have sworn falsely. If you are satisfied they have sworn the truth, you will admit this claim. If, on the contrary, you reject this claim, (which I do not, cannot believe,) you thereby declare, in terms not to be misunderstood, that they have sworn falsely, and been guilty of perjury. That is the complexion to which it would come, and it could not be disguised! Are you prepared for this? No. And I know you will not be!

Having said thus much upon the evidence as a whole, I will not occupy your time longer by animadverting upon the same in detail, but leave you to that well considered, deliberate, and thorough

examination of the same, in all its parts and bearings, which, I conceive, cannot fail to lead you to the same conclusion to which I have arrived, as to the legality of this claim, and next proceed to give the law respecting the sufficiency of evidence, as applicable to this case, according to which, it will be seen that the uncorroborated testimony of one of the above witnesses, say that of John Cart, who testifies, positively of his own knowledge, the said Dener rendered at least two years' service as a lieutenant, is sufficient to establish this claim to two years' service at least; and when corroborated, as it is, by all the other witnesses, facts and circumstances testified to, the evidence becomes abundantly cumulative and strong, methinks, as "proofs of Holy Writ."

In Bacon's Abridgement, volume 2, page 597: "It is holden by my Lord Chief Justice Holt that at common law it was not necessary in any case that a proof of any matter of fact should be made by more than *one* witness, and that the *single testimony of one credible witness was sufficient to prove any fact.*" And it is the constant practice of the courts of equity in England, and in this country, to ground their decrees upon the testimony of a *single* witness. The ecclesiastical courts of England were also compelled to observe these rules.—(Vide the authority above referred to. Archibald's Criminal Evidence, pages 156–7.) It is held that in cases of treason and perjury the testimony of two witnesses is necessary, or one witness with corroborating circumstances: "*In all other cases one witness is sufficient.*"

See, also, 2d Hawk, 6, 46, 2; Fost., 233, where the same principles are maintained. Phillips on Evidence, vol. 3, page 565, "one credible witness is sufficient even to convict of a crime, and a useless repetition of witnesses is discountenanced by law. The judge might, by the civil law, in his discretion, stop the multiplication of witnesses to the same matter, and this is not an unusual exercise of discretion in our own courts." See, also, Wood's Civil Law, 317. "Greenleaf on Evidence," vol. 1, page 324, also says, "that whatever was evidence at common law, is still good evidence under the express constitutional and statutory provisions of the American government." You thus perceive, sir, that, upon these principles, if George Frederick Dener were upon his trial for treason or perjury, with the weight of evidence before you, he would be convicted, and, in England, drawn and quartered, and his head severed from his body, and placed at the disposal of the sovereign.

Again: Starkie on Evidence, vol. 1, page 552, "the testimony of a single witness, where there is no ground for suspecting either his ability or his integrity, is a sufficient legal ground for belief; that it is strong enough to produce actual belief, every man's experience will vouch." Now, sir, we have seen the integrity of these witnesses to be above suspicion; and as to their ability, they have detailed with sufficient particularity the facts and circumstances which enabled them to know the truths to which they testified. Their ability to know the truths to which they have testified is as unquestionable as their integrity, and you cannot question the one without at the same time questioning the other. Bouvier says, vol. 2, page 659, "when we are called upon to rely on the testimony of another, in order to



form a judgment as to certain facts, we must be certain, 1st, that he knows the facts in question, and that he is not mistaken; and, 2d, that he is disposed to tell the truth, and has no desire to impose on those who are to form a judgment on his testimony. The confidence, therefore, which we give to the witness must be considered, in the first place, by his capacity or his organization; and, in the next, by the interest or motive which he has to tell or not to tell the truth. When the facts to which the witness testifies agree with the circumstances which are known to exist, he becomes much more credible than when there is a contradiction in this respect. It is true," he says, "that, until impeached, one witness is as good as another, and that one witness is sufficient to establish a fact."

Now let us apply the touchstone of these principles in weighing the evidence. The battle of Beaufort, Stono and Savannah, surrender of Charleston, after a protracted siege, capture and imprisonment of Americans for twelve months, are all matters of history. It is equally matter of fact (I was about to say history) that at the period of these scenes and incidents there was in Charleston an independent infantry corps, called "German fusileers," and that George F. Dener was lieutenant of said corps from 1776 to his death, in 1795, and that said corps served in the revolutionary war in the manner stated in Mrs. D.'s declaration, the following named persons having been pensioners for services in said corps, to wit: Mary Kelly, widow of John; Ann Cobia, widow of Nicholas; Franzinia Goelzinger, widow of Adam; and Mary Belser, widow of —. Now was Mrs. Dener, and those who have testified in support of her claim, in position to know the facts to which they have sworn? They (Mrs. D. and all) were in the exact position for all the world to see and to know the facts to which they have testified. They were all citizens of Charleston, where, it is evident from the testimony, not less than two years' service (including the twelve months' imprisonment) was rendered by Dener, and being his neighbors and intimate acquaintances, could not possibly be mistaken. Mrs. Gruber and Mrs. Godfrey, as well as Mrs. D., were in position to witness, and to know his services and imprisonment, which passed under their eyes in Charleston. The best possible evidence that the witnesses in this case were in position to know the services performed by Dener, as testified to, is to be found in the fact that they are, or have been in receipt of pensions for their participation in those very services. All the evidence and circumstances of this case prove incontestibly that Dener was in a position to perform the services attributed to him. And if, instead of performing the services alleged, he had abandoned his post of duty, deserted and acted cowardly, or tory like, would these brave and patriotic whigs have come forward, and conspire, at the price of perjury, to establish this claim? NO! Sir, they would ever afterwards have viewed him with scorn and contempt. Nay, they would ever afterwards have execrated his very name. Thus, you see, sir, that the claim of Christiana Dener to a pension for two years' (not less) services, as lieutenant in the revolutionary war, by her husband, George F. Dener, cannot be rejected, without a disregard of every feeling of gratitude, every principle of law, equity,

reason, and justice—every rational presumption, and all the known principles of human nature and action.

It will also brand these several witnesses with the crime of perjury, as far as your action can fix such a stigma—a result too monstrous and painful to be contemplated, or to be expected from an impartial mind, conscious of its own rectitude, and, therefore, not ready to suspect others capable of crime before high Heaven, and that, too, in a matter in which they can have no real or imaginary interest or motive to misrepresent, or even exaggerate in the smallest degree.

I have the honor to be, &c.,

M. THOMPSON, *Attorney, &c.*

Hon. JAMES E. HEATH.

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IN THE COURT OF CLAIMS.—No. 524.

CHRISTIANA DENER *vs.* THE UNITED STATES.

*Brief of United States Solicitor.*

The petitioner is the widow of George Dener, an officer of the revolution, and has been allowed by the proper department a pension under the act of July 7, 1838, and supplementary acts.

Under these acts, if the husband served two years, the widow receives a pension equal to his full pay; if he served for a shorter period, she is entitled to a pension proportionally less.

It is claimed that Dener served as lieutenant for two years, and that his widow is consequently entitled to an annual pension equal to his full pay..... \$320 00

The department has allowed for 3 months' service  
as private,  $\frac{3}{4}$  of \$80..... \$10 00

And for 17 months' service as lieutenant,  $\frac{17}{24}$  of \$320. 226 65

Annual pension, (error one cent)..... 236 65

Annual deficiency claimed..... 83 35

Arrears for 18 years..... 1,500 30

*As to the length of service.*

Dener was a member of the "German Fusileer Company," a volunteer militia association which has existed from the commencement of the revolution to the present time. It is not proved when this company was in the military service of the State. It is presumed that it was in service when the State was invaded or threatened by the British. No State ever kept militia permanently in service. The members of the company were citizens of Charleston; the company was suppressed while that city was held by the enemy, and was re-

organized when the enemy withdrew. These facts are shown by the testimony. Let us now apply the test of history to the allegations in the petition, taking Ramsay's History of the War in the South for our guide.

The service alleged may be divided into four terms.

**FIRST TERM.**—*One year's service as lieutenant prior to the capture of Charleston, (May 12, 1780.)*

Dener was certainly a private January 1, 1779.—(Rolls of the company, proved by Horlbeck.) He was lieutenant from 1779 to 1785.—(Rolls, proved by Strobel.) Besides the witnesses who speak from hearsay, five witnesses have testified of their own knowledge in this case. All proved that Dener belonged to the company, but of these one only, and she a woman, (Sarah Godfrey,) says that Dener was lieutenant as long as a year previous to the fall of Charleston. If he was a lieutenant from 1779, he could have been lieutenant not more than 4 months and 12 days prior to the fall of Charleston, May 12, 1780.

The British army invaded South Carolina, say May 10, 1779, and retreated, say June 21, 1779. They were in the State six weeks. The department has credited Dener with three months' service as private on this occasion.

From June, 1779, to February, 1780, the State was not invaded or threatened, and Dener could have rendered no service even if he was lieutenant.

The British reappeared February 11, 1780, and Charleston surrendered May 12, 1780. During these three months the German fusiliers no doubt did good service, and Dener should have credit for three months' service as lieutenant, and this is all that should be allowed for the first term.

**SECOND TERM.**—*One year on a parole during the British occupancy of Charleston.*

The city militia remained on parole, and it was a matter of complaint by the tories that they were treated with lenity and suffered to pursue their business. Some oppression was afterwards exercised towards them, Dener remained one year on parole, and then escaped, say in May, 1781. Soldiers in actual captivity are considered as in service, and by a decision of the Secretary of the Interior of October 15, 1850, a soldier on parole is considered as in captivity.—(Mayo & Moulton, p. 535.) This year should therefore be counted in favor of the petitioner.

**THIRD TERM.**—*From the time of his escape until the evacuation of the city—16 or 19 months.*

It is alleged that during this time Dener was in service with Marion.

There is some uncertainty as to the time of Dener's return to the city. The evacuation by the British was arranged before, and announced on the 7th of August, 1782; and one of the witnesses says the company was reorganized in September, 1782. The evacuation

did not, however, take place until December, 1782. But this question is immaterial, for there is not a particle of testimony in the papers to show that Dener ever served with Marion or otherwise after escaping from the city. No witness affirms, mentions, or refers to any such service.

FOURTH TERM.—*From the evacuation of the city to the conclusion of peace.*

The evacuation of the city was, then, virtually the end of the war. There is no evidence that the State kept any militia in service after that time—certainly not this company. Dener served in the company, and might, if he had not died, be still serving, for the company still exists; but such service does not entitle him to pension.

The claims of service which, in my opinion the evidence sustain, are;

One month as private in May and June, 1779. The Pension Office has allowed 3 months as private. Three months' service during the siege of the city, February 11 to May 12, 1780, as lieutenant; and 12 months on parole, at home attending to his own business—in all 15 months. The Pension Office has allowed 17 months as lieutenant.

JNO. D. McPHERSON,  
*Deputy Solicitor.*

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IN THE COURT OF CLAIMS.

CHRISTIANA DENER *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

The claimant states the following case: She is the widow of George Frederick Dener, who, as she alleges, served as a lieutenant in a corps of infantry, called the German Fusileers, in the war of the revolution, for the period of one year previous to the taking of the city of Charleston, South Carolina, by the British, on the twelfth day of May, 1780, when he was taken prisoner and detained in captivity twelve months. He then escaped, and served under General Marion, and afterwards, upon the reorganization of the German Fusileers, again became lieutenant, and served in that capacity in the corps from September, 1782, to September, 1783, amounting in all to more than two years' actual service as lieutenant, besides his twelve months' imprisonment.

The claimant was married to Dener before the first day of January, 1794. He died in the year 1795, and she has ever since remained a widow.

The claimant alleges that if her husband had survived the passage of the act of Congress of June 7, 1832, he would have been entitled to receive the full pay of his rank as lieutenant, being \$320 per annum, commencing on the fourth day of March, 1831, and continuing during his life.

The claimant also alleges that, under the act of July 7, 1838, she was entitled to five years' pay of her husband, from the fourth day of March, 1836; that by the first section of the act of March 3, 1843,

the first section of the act of June 17, 1844, and the first section of the act of February 2, 1848, she is entitled to receive during her life the pension which might have been allowed to her husband if he had been living at the time of the passage of the act of June 7, 1832. She exhibits a statement of the amount due, and the amount which she has received, and alleges that there is a balance still due of \$1,500 30.

The testimony on the part of the claimant is substantially as follows:

John Carl says that he was intimately acquainted with Dener; that he served with the rank of lieutenant in the German Fusileers, for two years and more, to wit: from the year 1779 to the end of the war, in April, 1783. He also says that Dener was a prisoner on parole for twelve months, and he speaks of Dener's service and imprisonment from his personal knowledge.

John Strobel says that Dener was a lieutenant of the German Fusileers from the year 1779 to 1785, in accordance with its roll book, when Daniel Strobel, the deponent's father, was captain of said company; and that from the evacuation of Charleston, in 1782, he positively knows that the company marched into Charleston under the command of his father, at which time Dener was first lieutenant. He also says that Dener was among the original founders of the German Fusileer Society, a charitable institution formed out of said company.

The same witness also says, in another deposition, that he has reason to believe, and has no doubt of the fact, being acquainted with Dener at the commencement of the revolution, that he joined a corps called the Charleston light infantry, commanded by Captain Prioleau, and served in the same for two years during the war of the revolution, and says that he believes, and has no doubt, that he held the rank of lieutenant in the corps for twelve months previous to the surrender of Charleston, in May, 1780.

The only knowledge which this witness has of Dener's services as lieutenant from September, 1782, to September, 1783, is derived from hearsay.

William Purse remembers seeing Dener in the uniform of a lieutenant of the German Fusileers. This is competent evidence that he was a lieutenant in the corps.

Mrs. W. B. Gruber knew Dener as an officer, and believes that he was a lieutenant in the German Fusileer company, and her belief is that she knew him to be so an officer for more than one year, and it may be two, but she cannot speak positively as to the period of his service.

Mrs. Godfrey remembers Dener as being in the German Fusileer company as an officer, and, she has reason to believe, a lieutenant, and that he served in the same previous to the fall of Charleston one year.

Joseph Righton saw Dener in the uniform of an officer of the German Fusileers.

It appears from the letter of the Commissioner of Pensions, of De-

ember 30, 1856, to Mr. McPherson, that he considered that the evidence proved the performance of service by Dener as a private for three months and as a lieutenant for seventeen months, and the claim for a pension in proportion to that service was allowed accordingly. The claimant alleges that the evidence proves the performance of service by Dener as a lieutenant for the period of two years, and that she is, therefore, entitled to a pension of \$320 per annum, instead of a pension of \$236 65, the sum allowed by the department.

There is undoubtedly competent evidence that Dener held the commission of lieutenant for more than two years, that is, from the year 1779 to the year 1785, but it does not follow from this that he was entitled to a pension amounting to the full pay of his rank. Regard must be had to the nature of the corps in which he served, and to the circumstances under which he performed military duty. The corps of German Fusileers was a volunteer company of militia, not permanently maintained by the State, and called upon to perform military duty only when their services were required in any particular emergency. It is only by ascertaining the amount of duty which he actually performed while he held his commission that the true amount due his widow can be determined. In the first place, he was taken prisoner on the 12th of May, 1780, when Charleston was taken by the British and detained as a prisoner of war on his parole for a period of twelve months. When he was taken prisoner he was in actual service as a lieutenant. Soldiers in actual captivity are considered as in service, and by a decision of the Secretary of the Interior, of October 15, 1850, a soldier who is a prisoner on parole is considered as in captivity. As to this year's service there is no question, and the Solicitor admits that this year should be counted in favor of the claimant.

In regard to the additional period of service as lieutenant alleged to have been performed by Dener, the evidence is extremely indefinite and defective. The widow's claim for a pension rests upon the period during which her husband was in actual service as a private or a lieutenant in the corps of German Fusileers, and no period during which he may have been a member of the corps, while the corps was not in actual service, establishes any right whatever to a pension. There is no evidence whatever as to the precise period during which this corps was in actual service, but it is assumed, and the assumption is a reasonable one, that the corps was in actual service from the invasion of the State by the British, on the 11th of February, 1780, until the surrender of the city of Charleston, on the 12th of May following, at which time Dener became a prisoner of war.

We find no evidence rendering it even probable that Dener performed more than three months' service as a lieutenant before the surrender of the city. This period, added to the period of twelve months, during which he was a prisoner of war, makes fifteen months, for which time of actual service the department has given him credit, and it has also given him credit for the additional period of two months' actual service as a lieutenant.

It appears from the letter of the Commissioner referred to that the pension for seventeen months' service as a lieutenant was granted, not only upon testimony produced by the claimant, but upon corroborating

testimony found with the papers of sundry pensioners inscribed upon the rolls, which testimony is not before us.

The department has also allowed the claimant for three months' service by Dener as a *private* in the German Fusileers, in the year 1779, on the testimony of Daniel Horlbeck.

The claimant alleges that Dener escaped from the British, after having been a prisoner of war for twelve months, and served under General Francis Marion. The evidence is that he was a prisoner on parole, and if he broke his parole without any justification, and served under Marion, he committed a very grave military offence. But the evidence does not prove that he served under Marion. The only witness on this point is John Strobel, and he says that after Dener's escape, "he then, as this deponent always heard and believed, made his way to Marion's camp." This evidence is not sufficient to prove that Dener performed any service under Marion.

The opinion of the Court is that the claimant has been allowed the full amount of the pension to which the services of her husband entitle her, and that she has no cause of action against the United States.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

ABRAHAM R. WOOLEY *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Proceedings of the court-martial referred to in the opinion of the Court, and transmitted to the Senate.
3. Claimant's argument or brief.
4. Solicitor's brief.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.

SAMUEL H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

UNITED STATES COURT OF CLAIMS.

ABRAHAM R. WOOLEY *vs.* THE UNITED STATES.

*To the Honorable the Judges of the Court of Claims:*

The petition of Lieutenant Colonel Abraham R. Wooley, a resident of the city of Louisville, in the State of Kentucky, respectfully states, that he entered the army of the United States a captain in year 1812; served through the war with Great Britain, and received the distinction of being retained in the service in the two reductions of the army in 1815; and 1821 that he rose to the grade of major



in 1815 ; in February, 1825, was brevetted a lieutenant colonel, "for long and meritorious service," and in December, 1825, was commissioned a full lieutenant colonel.

In 1829 he was subjected to trial by court-martial upon certain charges and specifications, and found guilty of having punished a private soldier of company D, 6th infantry, with a few lashes ; and of some aberrations of conduct arising from hasty and ungovernable temper ; the court sentenced him to be dismissed from the service, which sentence was approved and carried into effect by the President. Your petitioner alleges that the court-martial that tried and condemned him was irregularly constituted, both as to the number and rank of the officers composing the court. The 64th article of war requires that a general court-martial for the trial of an officer "shall not consist of less than thirteen, when that number can be convened without manifest injury to the service." The court that tried him consisted of only seven members, though it does not appear that a full court could not have been convened "without manifest injury to the service." Of the seven officers who composed the court four were his juniors ; whereas, the 75th article of war provides that "no officer shall be tried but by a general court-martial, nor by officers of inferior rank, if it can be avoided."

Your petitioner further alleges, that if the court that tried him was irregular the sentence was also irregular. That it was too severe for the nature of the offence, and that the whole proceedings were without precedent and illegal. In view of these facts, your petitioner avers that he was wrongfully dismissed from the service of the United States, and for these, and other reasons, which will be made manifest to your honors by the papers and documents accompanying this, his petition ; he claims to have been continued in the said service, and to be entitled to all the advantages pertaining to his rank in the army of the United States as aforesaid, and to the pay and emoluments arising therefrom, from the 1st day of May, A. D. 1829, up to which day he was last paid, to the present time, for which he presents his account herewith, amounting to the sum of forty-four thousand five hundred and ninety-eight dollars and forty cents ; and prays such relief in the premises as to your honors may seem just and proper.

Your petitioner would further state, that he petitioned the Senate of the United States at the 1st session of the 32d Congress, to wit : on the 14th day of January, 1850, which was referred to the Committee on Military Affairs ; on the 30th of September following the committee was discharged from its further consideration ; on the 5th of December, 1850, it was recommitted. On the 25th of February, 1851, an adverse report (No. 316, 2d sess. 31st Congress) was made, and the committee discharged. On the 4th of February, 1852, was again referred to the Committee on Military Affairs, and on the 24th of February, 1853, the committee was discharged, and no further action has been had thereon by the Congress of the United States.

Your petitioner would further show, that he has not assigned or transferred said claim, or any part thereof, but that he is the sole owner thereof, except one year's pay and emoluments received since 1830.

Your petitioner prays your honors to inquire into the matters aforesaid, and to grant him such relief as to law and justice may appertain.

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COURT OF CLAIMS.

A. R. WOOLEY, }  
                   *vs.*  
 THE UNITED STATES. }

I. The proceedings of the court-martial condemning Col. Wooley were illegal and void; in violation of the 64th article of war.—1 Stat. 367.

The court did not consist of 13 members. It does not appear that that number could not have been convened "without manifest injury to the service." This should appear on the face of the order.—Peter Clark's case, Op. Att'y. Gen., 1229; Midshipman Guthrie, Op. Att'y. Gen., 1329. On the contrary, the order recites: "A greater number cannot be assembled without *prejudice* to the service."

"The court-martial being a court of limited jurisdiction, it is necessary for the plaintiff to show that it was legally constituted and had jurisdiction of the alleged offence."—Per case *Brooks vs. Davis*, 17 Pick. 149; *Brooks vs. Adams*, 11 Pick. 441; *Mills vs. Martin*, 19 Johnson, 7.

2. In violation of the 75th article of war.—1 Stat., 367.

In this case it appears from the face of the proceedings that a legal court could have been formed without putting on *four* of inferior court. If two of them illegally on the court had not been there Col. W. *might* have been acquitted, and it does not and cannot appear that he *would* not.—*The People vs. White*, 24 Wend., 544; 1 Chit. Crim. Law, 744; 4 Bl. Com., 390; *Brooks vs. Davis*, 17 Pick., 148.

The omission to challenge the court, (if such a thing could be done in this case,) does not waive the right of the party or obviate the difficulty.—*Gormand vs. The People*, 1 Hill, N. Y. Rep., 343; *Brooks vs. Davis*, 17 Pick., 148.

When a judgment is void on the ground that it was not rendered by a competent court, it may be avoided without a writ of error.—2 Hawkins, P. C., ch. 50.

*Gormand vs. The People*, 1 Hill, 343.

"The rule that consent will not confer jurisdiction applies as well to consent in creating a tribunal as to consent in submitting a matter to a subsisting tribunal which the law has excluded from its cognizance."—Marg. note.

II. Col. Wooley was dismissed by the judgment of a court-martial and by operation of law, and not as a punishment for an alleged crime, and not by his President under his power to remove from office.—See 11 Article of War, 2 Stat. 361.—See Record.

The act of the President was of a semi-judicial character, in connexion with and as a part of the doings of the court. The act of *approving* the judgment of the court-martial without any order from the

President *proprio vijsus* displaced the officer. The officer is recommended to the pardoning power, "the clemency," of the President. The President, by his secretary, spoke of *setting aside the verdict*, and "restore Col. Wooley again to his rank and to his command."

The secretary is directed to say that this "cannot be done, regard being had to the high obligation of seeing that the laws are faithfully executed."

Again: "If, after conviction by a court, the offender shall find clemency through the interposition of the Executive."

"Lieutenant Col. A. R. Wooley, of the 6th regiment of infantry, consequently ceases to be an officer of the army of the United States. By command of Major General Alexander Macomb, commanding the army.

"R. JONES,  
"Adjutant General."

2 Stats., 367.—"Art. 64. General courts-martial may consist of any number of commissioned officers from five to thirteen, inclusively, but they shall not consist of less than thirteen, when that number can be convened without manifest injury to the service."

"Art. 75. *No officer shall be tried but by a general court-martial, nor by officers of an inferior rank, if it can be avoided*; nor shall any proceedings or trial be carried on, except between the hours of eight in the morning and three in the afternoon," &c.—The People *vs.* White, 24 Wend., 544; 1 Chit. Cr. Law, 744; Morton *vs.* Nott, 12 —, 38; 4 Bl. Com., 390; Brooks *vs.* Davis, 17 Pick. Rep., 148; Germond *vs.* The People, 1 Hill's (N. Y.) Rep., 343; Dykeman *vs.* Magery, N. Y., 1 Selden Rep. Court of Appeals, 440; 14 Mass. Rep., 393; Peter Clark's case, Opinions At. Gen., 1229; Peter Clark's case, Hart, 129; Midshipman Guthrie's case, Opinions At. Gen., 1329; Midshipman Guthrie's case, Hart, 129; John H. Clark's case, Opinions At. Gen., 808; Lieutenant Carpenter's case, Opinions At. Gen., 888; 11th article of war.

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IN THE COURT OF CLAIMS.—No. 410.

ABRAHAM R. WOOLEY *vs.* THE UNITED STATES.

*Solicitor's Brief.*

The petitioner claims the pay and emoluments of a lieutenant colonel in the United States army from the 1st day of May, 1829, to the present time, less the amount of one year's pay.

He avers that, being a lieutenant colonel in the army, he was, in the year 1829, tried by a court-martial and sentenced to be dismissed the military service, which sentence was approved and carried into effect by the President.

He further alleges that the proceedings of the court were illegal, and that he was wrongfully dismissed from the service; on which ground, and for other reasons not stated, he makes this claim.

Notwithstanding that in the third paragraph of his petition "he claims to have been continued in the said service," I do not understand him to aver that he now holds, or since the 1st of May, 1829, has held, the rank and office of lieutenant colonel in the army. This would be inconsistent with the averment that he was dismissed, and, moreover, it is stated argumentatively as an inference from other facts, not as a substantive allegation.

I understand the petition to put in issue only the legality of the proceedings of the court-martial; and the only question raised by it is, whether a person who has been dismissed the service unjustly is entitled to continue in the receipt of his pay and emoluments.

No statute, regulation, or express contract is set forth in the petition, and the circumstances stated do not tend to prove any implied contract on the part of the United States to continue to the claimant his former pay and emoluments. The fact put in issue by the petition is simply the jurisdiction of the court by which he was tried; whereas, on the part of the United States, it is contended that he cannot recover the pay and emoluments of a lieutenant colonel during the period stated unless he held such an office, and that before an order to take testimony is made the petition must be so amended as to admit all legal evidence going to prove that the petitioner held no such office, and was not in fact in the military service during the period in question.

JNO. D. McPHERSON,  
*Deputy Solicitor.*

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IN THE COURT OF CLAIMS.

ABRAHAM R. WOOLEY *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court.

The petitioner states the following case: He entered the army of the United States as a captain in the year 1812, served through the war with Great Britain, and received the distinction of being retained in the service in the two reductions of the army in 1815 and 1821. He rose to the grade of major in 1815; in February, A. D. 1825, was brevetted a lieutenant colonel, "for long and meritorious services;" and in December, A. D. 1825, was commissioned a lieutenant colonel.

In 1829 he was subjected to trial by a court-martial upon certain charges and specifications, and found guilty of having punished a private soldier of company D, 6th infantry, with a few lashes, and of some aberrations of conduct arising from hasty and ungovernable temper. The court sentenced him to be dismissed from the service, and the sentence was approved and carried into effect by the President.

The petitioner alleges that the court-martial which tried and condemned him was irregularly constituted, both as to the number and rank of the officers composing the court. The 64th article of war requires that a general court-martial for the trial of an officer "shall not consist of less than thirteen, when that number can be convened

without manifest injury to the service." The court which tried him consisted of only seven members, and it does not appear that a full court could not have been convened "without manifest injury to the service." Of the seven officers who composed the court four were his juniors, whereas the 75th article of war provides that "no officer shall be tried but by a general court-martial, nor by officers of inferior rank, if it can be avoided."

The petitioner further alleges that the sentence was irregular ; that it was too severe for the nature of the offence, and that the whole proceedings were without precedent and illegal. He avers that he was wrongfully dismissed from the service of the United States ; and for these and other reasons, which will be made manifest by the papers and documents accompanying his petition, he claims to have been continued in the service, and to be entitled to all the advantages pertaining to his rank in the army of the United States, and to the pay and emoluments arising therefrom, from the first day of May, A. D. 1829, up to which day he was last paid, to the present time, for which he presents his account, amounting to the sum of \$44,598 40. He has received one year's emoluments and pay since 1830. He prays such relief in the premises as to the Court may seem just and proper. He petitioned the Senate of the United States at the first session of the 32d Congress. His petition was referred to the Committee on Military Affairs. On the 30th of September following the committee was discharged from its further consideration. On the 5th of December, A. D. 1850, it was recommitted ; on the 25th of February, A. D. 1851, an adverse report (No. 316, 2d session 31st Congress,) was made, and the committee discharged. On the 4th of February, A. D. 1852, it was again referred to the same committee, and on the 24th of February, A. D. 1853, the committee was discharged, and no further action has been had thereon by the Congress of the United States.

A copy of the record of the court-martial in the petitioner's case is on file with his petition, and may be regarded as a part of it. The court was convened by order of Brigadier General Atkinson. He directed it to consist of seven members : two colonels, one lieutenant colonel, one major, and three captains, and it was stated in the order that "a greater number cannot be assembled without prejudice to service." Before the court was fully organized, the petitioner was asked if he had any objections to the members named in the general order. He replied in the negative, and then the court was duly sworn in his presence. He filed a plea to the jurisdiction of the court ; but the court overruled it. He then filed what is called in the record a *plea in bar*. This was also overruled by the court. He thereupon pleaded *not guilty* to each and all of the charges and their specifications.

The officer who ordered the court was necessarily obliged to decide whether thirteen officers could be convened on the court-martial without manifest injury to the service, and also whether the appointment thereon of officers of inferior rank could be avoided ; and his decision was obligatory on the court. In the case of *Martin vs. Mott*, (12 Wheaton R., pp. 15, 35,) the Supreme Court say that his decision as to the number that can be convened, being in a matter submitted

to his sound discretion, must be conclusive. For the same reason, his decision that the appointment of officers of inferior rank cannot be avoided must also be conclusive. The court, therefore, very properly overruled the plea to the jurisdiction.

In pursuance of the 65th of the rules and articles of war, the whole proceedings of the court in the petitioner's case were transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval and orders in the case. If it be competent for the President to revise the decision of the officer appointing a court-martial, in regard to the number or rank of the officers of whom it consists, the objection must necessarily be made before him at this stage of the proceedings, or at least before he finally acts upon the case; for, if he approves of the proceedings of the court, his approval, like a judgment of a court of the last resort, is final and conclusive, and there can be no appeal from it. No such objection was made before the President in this case. The proceedings of the court were submitted to him, and he "approved the same." His approval was in legal effect the same as a final judgment of a court of competent jurisdiction, and the only thing which then remained to be done was to carry the sentence of the court into execution. This was done, and from that time the petitioner ceased to be an officer of the army of the United States.

No order will be made directing testimony to be taken in this case.



IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following



REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

FRANCIS NADEAU *vs.* THE UNITED STATES.

1. The petition of the claimant.
  2. Documents received from House of Representatives and transmitted to that House.
  3. Document received from the Department of the Interior and transmitted to the House of Representatives.
  4. Claimant's brief.
  5. Opinion of the Court adverse to the claim.
- By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.

SAMUEL H. HUNTINGTON,  
*Chief Clerk of the Court of Claims.*

*To the honorable Judges of the Court of Claims of the United States:*

The petition of Francis Nadeau, of Mooers, in the county of Clinton, in the State of New York, one of the children of Basil Nadeau, deceased, begs leave respectfully to represent unto this honorable court, that he is interested as one of the heirs-at-law of the said Basil Nadeau, in a claim which the said Basil Nadeau had against the United States for services in the revolutionary war. That his interest in said claim arises from the consideration that he is the son and heir-



at-law (and the only one now known to be living) of the said Basil Nadeau, who died intestate, on or about the eleventh day of July, A. D. 1841.

And your petitioner further shows to this honorable court that the said Basil Nadeau enlisted in 1776 for and during the war in Colonel Moses Hazen's regiment in the continental line, and served therein to the close, or until discharged by Congress; and that the before mentioned claim is founded on a resolution of Congress, passed the 15th day of May, 1778, which provides that those soldiers who enlisted for and during the war, and continued in its service until its termination, were entitled to the reward of eighty dollars; and for which your petitioner is informed a certificate issued, bearing interest at the rate of six per cent., on or about the first day of March, 1784, which certificate, if ever delivered, is now lost; and that said reward has never been paid or transferred, as your petitioner is informed and verily believes true.

And your petitioner further sheweth that, previous to said Nadeau's enlistment for the war, to wit: on the 16th day of September, 1776, Congress passed a resolution giving \$20 bounty money, and granting bounty lands of 100 acres to those who enlisted for the war, continued therein to the close of the war, or until discharged by Congress. And your petitioner further shows, that he made application to the Commissioner of Pensions for said land, which application was denied; also, that he applied to Congress for said land in 1854, but what action was had thereon he is not informed.

Your petitioner therefore prays that this honorable court will examine said claim, and report a bill to Congress for the payment thereof, with the interest thereon, unto the heirs or legal representatives of the said soldier, or such other order or bill as to your honors shall seem fit and proper in the premises, and for said land.

And your petitioner, as in duty bound, will ever pray.

his  
FRANCIS + NADEAU.  
mark.

Dated ROUSSE'S POINT, *August 3, 1855.*

STATE OF NEW YORK, }  
County of Clinton, } ss.

Francis Nadeau, of Mooers, in the county of Clinton, in the State of New York, being duly sworn, doth depose and say that the petition above, by him subscribed, contains the truth, according to the best of his information and belief.

his  
FRANCIS + NADEAU.  
mark.

Sworn and subscribed before me, this 3d day of August, A. D. 1855.

JOHN BULLIS,  
*Justice of the Peace.*

## IN COURT OF CLAIMS.

FRANCIS NADEAU, }  
 vs. } *Claimant's Points and Brief.*  
 THE UNITED STATES. }

I. This claim, like the claims of officers under the resolutions of the 21st of October, 1780, and March 22, 1783, must be regarded as in the nature of an express contract.—(See Mayo & Moulton, Introduction, vii, page 177.)

This claim is founded on the resolution of Congress of 15th of May, 1778, and entitled the ancestor of claimant to the reward of \$80, for services rendered, and continued to the end of the war. Here was work, labor and services performed, as the consideration for the reward, and the books show him entitled to the certificate, on the 1st day of March, 1784, and does not show it paid.

II. As a debt or claim due, and payment withheld, all the legal consequences attach between the United States and the claimants, as in the case of individuals, as it respects the claim of interest.

And Congress designed that interest should be paid "on all claims and to all creditors of the United States from the time payment became due."—(See Compend. &c., on revolutionary claims, Document No. 42, for 1837, 38.)

III. Congress has acknowledged the obligation to pay the *principal* in an analogous case.—(See Colin McLaughlin's Bill 249, passed 2d ses. 21st Congress; Report 1st Ses. 21 Cong. No. 194, as follows:)

IV. Claims to be entitled to 100 acres of land under resolve of Congress September 16, 1776.

## REPORT.

"The petitioner claims and satisfactorily proves, that by his services as a sergeant in Col. Moses Hazen's regiment in the army of the revolution, to the end of the war, (having then been discharged and honored with the badge of merit,) he became entitled to the reward of \$80, offered by the resolve of Congress of May 15, 1778.

The only question remaining is whether he received this reward?

No register or other evidence has been found showing that it has ever been paid. The petitioner has made oath, in an accompanying affidavit that he has never received it.

The character of the petitioner for veracity is supported by certificates of respectable individuals acquainted with him.

The committee believe, under view of all the evidence, that it would be unjust to withhold the reward from him, and therefore report a bill directing the payment to him of the original sum of eighty dollars."

C. K. AVERILL,

*Attorney for Claimant.*

## IN THE COURT OF CLAIMS.

FRANCIS NADEAU *vs.* THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

The petitioner alleges that he is the only son and heir-at-law of Basil Nadeau, who died on the 11th of July, 1841, and who was a soldier in the army of the revolution. The petition states that Basil Nadeau enlisted in 1776, for and during the war, in Colonel Moses Hazen's regiment in the continental line, and served therein to the close of the war, or until discharged by Congress. The claim is founded on the resolutions of Congress of the 15th of May, 1778, providing that soldiers who enlisted for and during the war, and continued in service until its termination, should be entitled to a reward of \$80. For this the petitioner was informed that a certificate issued, with interest at six per cent., on or about the 1st day of March, 1784, which certificate, if ever delivered, is now lost, and that this reward has never been paid or transferred as the petitioner is informed and believes.

It is sufficient to say in relation to this claim that the decision in the case of Philip Lamoy *vs.* the United States is applicable to this case, and settles that the claimant has no cause of action.

The petitioner makes a further claim, as follows: "That previous to Nadeau's enlistment for the war, to wit: on the 16th day of September, 1776, Congress passed a resolution giving \$20 bounty money, and granting bounty land of 100 acres to those who enlisted for the war and continued therein to the close of the war, or until discharged by Congress. And your petitioner further shows that he made application to the Commissioner of Pensions for said land, which application has been denied."

The allegation of the petitioner, therefore, is, that the Commissioner of Pensions incorrectly decided that Basil Nadeau was not legally entitled to bounty land.

By the resolution of September 16, 1776, Congress made provision for a bounty of \$20 "to each non-commissioned officer and private soldier who should enlist to serve for the present war, unless sooner discharged by Congress."

"To the officers and soldiers who shall so engage in the service and continue therein to the close of the war, or until discharged by Congress," certain quantities of land, the share of each non-commissioned officer and soldier being 100 acres.

In order, therefore, to entitle the soldier to the bounty land he must have enlisted to serve during the war, and have continued in the service to the close of the war, or until discharged by Congress.

In the petition to Congress, which, with the accompanying papers, has been laid before us, it is stated that Basil Nadeau "on the 16th day of November, 1776, enlisted for the war in General Moses Hazen's regiment, (Congress regiment,) and continued to serve to the close of the war, the term of his enlistment, although the word *omitted* appears at the end of his name on the rolls, in March, 1781."

It appears that on the 26th day of June, 1819, the said Basil Nadeau was inscribed on the pension list at the rate of eight dollars per month. This was under the pension act of March 18, 1818. It does not, however, follow from this that he served to the end of the war, because a service of nine months entitled him to a pension.

The evidence accompanying the petition to Congress is as follows: Basil Nadeau testifies that in the year 1776 he enlisted for the war, and served in Captain Ollive's company of Canadian volunteers, in Hazen's regiment, and continued in the service until the close of the war, when he was regularly discharged. There is also the testimony of Francis Nadeau, the son of Basil Nadeau, who testifies that he believes that his father did enlist and serve as aforesaid. Alexander Ferriole testifies that he knows that Basil Nadeau did perform the military services stated in his affidavit. This is all the evidence going to show that Basil Nadeau served to the end of the war.

In the letter of Mr. Waldo, Commissioner of Pensions, dated the 15th of April, 1853, and addressed to C. K. Averill, esq., there is the following statement:

"Upon a thorough investigation of the rolls and records of this office, it is found that Basil Nadeau enlisted November 16, 1776, and that his name was omitted on the rolls in March, 1781, and was never after restored to the rolls, thereby furnishing the most conclusive evidence that he left the service at the last mentioned date, and never again returned to his regiment; which fact is fully confirmed by the books of final settlement certificates, which show that the last certificate for pay issued to Nadeau was for \$13 30, dated January 1, 1782, that sum being his monthly pay for January and February, 1781, his name being dropped from the rolls in March, 1781.

"In one of your statements you say that certificates were issued to him as late as November, 1783. A careful re-examination of the books shows that no certificates for pay whatever issued in his name at any period of the year 1783.

"The term 'omitted,' when it appears on the rolls opposite to the name of a soldier, has no other signification than that the soldier left the service in consequence of sickness or disability of some kind without receiving a 'discharge,' and not afterwards returning to the service it became useless to continue his name on the rolls, and he is noted thereon 'omitted.'

"The within patent for 200 acres of land, granted by the State of New York in April, 1830, to Basil Nadeau, under a special act of the legislature of that State, passed 25th April, 1829, recognizes Nadeau *in no other character* than that of a 'Canadian refugee,' and this grant of 200 acres of land was made thirty years after the grants by New York were generally made to those reported to that State by the officers appointed for that purpose under the 14th section of the act of the legislature of said State, passed May 11, 1784. This patent, therefore, furnishes no evidence whatever of Basil Nadeau's services to the close of the war in 1783."

Unless, perhaps, in some extraordinary cases, which this does not appear to be, the evidence furnished by the rolls must be considered as conclusive, although, as it appears by the letter of General Dear-

born, of the 27th of July, 1803, the returns of the New York line subsequent to the year 1781 were destroyed by fire in November, 1802. The rolls for the year 1781 show that the name of Basil Nadeau was "omitted," and Mr. Waldo's letter shows the meaning to be attached to the word "omitted." We do not mean to say that he might not have served to the close of the war, but merely that the evidence does not authorize us to come to that conclusion. We have merely, on the one hand, the evidence of Basil Nadeau that he served to the end of the war, and the very indefinite statement of Ferriole that he knew that he did so serve; and, on the other hand, the evidence furnished by the rolls that his name was omitted. There is, also, the fact stated by Mr. Waldo that no pay certificate in his name was issued in 1783, the last certificate appearing on the books to have been issued on the 1st of January, 1782, for \$13 30 for his monthly pay for January and February, 1781, his name being dropped from the rolls in March, 1781.

Our opinion, therefore, is, that the claimant has no cause of action.





IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

DAVID NOBLE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documents submitted by claimant as evidence, and transmitted to the House of Representatives.
3. Claimant's brief.
4. United States Solicitor's brief.
5. Opinion of the court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this 7th day of December,  
[L. s.] A. D. 1857.

SAML. H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

*To the Hon. Judges of the Court of Claims of the United States:*

The petition of David Noble, of ———, in the county of ———, in the State of ———, begs leave respectfully to represent unto this honorable court that he is interested, as a grandchild of David Noble, deceased, in a claim which the said David Noble had against the United States for services in the revolutionary war. That his interest in said claim arises from the consideration that he is one of the grandchildren and heirs-at-law of the said David Noble, who died intestate on or about the ——— day of July, A. D. 1776, and in consideration



of certain resolves of Congress hereinafter named. And your petitioner further represents that the said David Noble was commissioned by Congress a captain A. D. 1774 or 1776, in the continental service, in the revolutionary war, and served as such officer until his death as aforesaid. That by a resolution of Congress of the 24th day of August, 1780, it was provided that the resolution of the 15th of May, 1778, granting half pay for seven years to the officers of the army who should continue in service to the end of the war, be extended to the widows of those officers who have died, or should thereafter die in the service, to commence from the time of such officers' death, and continue for the term of seven years; or if there should be no widow, or in case of her death or intermarriage, the said half-pay should be given to the orphan children of the officer so dying as aforesaid, if he should have left any, &c. And your petitioner avers that the said David Noble died when in the service, before the end of the war, and at the time above stated, leaving a wife and children him surviving, but who are now dead, leaving issue, grandchildren.

And your petitioner further shows to this court that the seven years' half pay provided for in the foregoing resolution has never been paid, but remains as a debt or claim due to the estate or representatives of the said officer from the United States.

That several applications to Congress have been made for the payment of said claim, with the interest; and there have been two reports thereon in favor of said claim; the last report accompanied with a bill, which was read in the Senate and passed to a second reading; which reports, with the evidence and all the proceedings, they ask to be filed in this court as a part of their case.

Your petitioner therefore prays that this honorable court will examine into the justice and equity of said claim, and report a bill to Congress for the payment thereof, with interest, unto the legal representatives of the said officer, or such other order or bill as shall seem fit and proper in the premises.

And your petitioner, as in duty bound, will ever pray.

C. K. AVERILL,

*Attorney for Claimant.*

Dated FEBRUARY 20, A. D. 1856.

STATE OF NEW YORK, }  
County of Clinton, } ss.

Calvin K. Averill, of Rouse's Point, in the county of Clinton, in the State of New York, being duly sworn, doth depose and say that the petition above, by him subscribed, contains the truth, according to the best of his knowledge, information and belief.

C. K. AVERILL.

Sworn and subscribed before me, this 20th day of February, A. D. 1856.

M. VAN DERVORT,  
*Justice of the Peace.*

## IN COURT OF CLAIMS.

DAVID NOBLE AND OTHERS *against* THE UNITED STATES.*Claimants' points and brief.*

1. This claim has all the legal affinities of an express contract.

It is founded on a resolution of Congress of the 24th August, 1780, extending the resolution of the 15th May, 1778, of half pay for seven years to the widows of officers who have died in the service, to commence from their death, and in case of no widow, or in case of her death or intermarriage, the half pay to be given to the orphan children of said officer, if he shall have left any.

Captain Noble died in the service in July, 1776; and when the resolution of August 24, 1780, passed, the right vested immediately in the ancestors of the claimants.

2. This case is distinguishable from a mere gratuity, without consideration like a present, inasmuch as the resolution seeks to *recompense* for past services and loss of life. The amount is certain; it is liquidated, and is to be paid in money; and, as a debt or claim due, carries with it all the legal consequences arising between debtor and creditor for withholding payment after due, which raises the question of interest.

3. The validity of this claim has been twice passed on in Congress, and always reported on favorably. The House Report No. 49, 2d session, 26th Congress, passed it without interest. The Senate Report No. 223, 1st session, 30th Congress, accompanied by Bill No. 335; Senator Bright, in the conclusion of the report, says:

“Which seven years' half pay aforesaid, commencing at the death, is certainly due, with interest from that time, as by numerous decisions of Congress is seen, and the facts of the case show it just and legal.”—(See Journal of Congress, 3 pages, 512-'13.)

“By the laws of resolutions of the old Congress *interest* was allowed on all claims and to all creditors of the United States from the time payment became due.”—(See Compend., &c., on Revolutionary Claims, Document No. 42, for 1837-'38.)

The amount due on the 30th July, 1776, was \$1,680, which is the half pay of a captain for seven years, at the rate of \$480 per annum. The simple interest on this sum, in addition, is claimed as justly and legally due, as the damages for withholding payment, as well as to compensate for the time and expense of prosecuting their claim.—(See case of Colonel John Durkee's representatives, seven years' half pay, *with interest*, act July 1, 1812, 1st session of 12th Congress. Also Lieutenant Wilson's case, act February 27, 1833, seven years' half pay, *with interest*, under resolution of August 24, 1780. See Mayo and Moulton's Pension and Bounty Laws, page 175.)

CALVIN K. AVERILL,

*Attorney for Claimants.*

*Limitations.*—To children of officers who died in service, relaxed.—(See Amer. State Papers, “Claims,” pages 20, 22, 25.)

IN THE COURT OF CLAIMS.—No. 509.

HEIRS OF DAVID NOBLE *vs.* THE UNITED STATES.*Brief of United States Solicitor.*

The petition in this case alleges that David Noble entered the continental service in 1775, and that he remained in said service till the summer of 1776, when he died. It is claimed that the widow and children were entitled to seven years' half pay under the resolutions of Congress of May 15, 1778, and August 24, 1780.

1. Those resolutions, among other provisions, promised half pay for seven years to the widows and children of officers, commissioned by Congress, who had died in service; to the widow, if living, and while unmarried, and to the officer's children on her death or marriage. The petitioner does not set forth or show in what right he claims; merely as grandchild of the officer, he is not entitled to recover. He should show whether, under the conditions of the resolution, the half pay went to the widow or to the children, and then derive his right from the person or persons entitled.

2. This claim is barred by limitation under the resolutions of the continental Congress of November 2, 1785, (4 Journals, 603,) and July 23, 1787, (Id. 762,) as construed by act of March 23, 1792, sec. 1, (1 Stat., 243,) and by the act of February 12, 1793, (1 Stat., 301.)

3. The certificate of the secretary of state of Massachusetts proves that Captain Noble was in continental service as late as the 6th of October, 1775. The depositions of James Noble and Solomon Martin, the original muster and pay roll attached to the deposition of the latter, and the original letter from Captain Noble to his wife, dated July 1, 1776, strongly indicate that he remained in service up to the time of his death. In regard to the last two documents, it is necessary to say that is not shown where the pay-roll came from, nor is the handwriting of Captain Noble, in the letter produced as his, proven. But however clear the case may seem, the fact that Congress, as early as in 1787, found it necessary to interpose statutes of limitation to bar these claims, warns us of the difficulty of attempting to pronounce upon their merits after a further lapse of seventy years.

Moreover, the claims for seven years' half pay to widows were, by the terms of the resolution to be settled, and were in many cases settled, by the States themselves; Massachusetts settled many such claims; (Am. St. Papers, Claims, pp. 70, 72;) and if the widow and children of Noble were omitted in that settlement, the presumption is very strong that they were not entitled.

JNO. D. McPHERSON,  
*Deputy Solicitor Court of Claims.*

## IN THE COURT OF CLAIMS

DAVID NOBLE *vs.* THE UNITED STATES.

SCABBURGH, J. delivered the opinion of the court.

The petitioner alleges that he is a grandchild and one of the heirs-at-law of David Noble, deceased; that David Noble was commissioned by Congress, in the year 1774 or 1775, a captain in the continental service, in the revolutionary war, and served as such till his death, which occurred in July, A. D. 1776; that he died intestate, leaving a wife and children surviving him, "but who are now dead, leaving issue, grandchildren;" and that the seven years' half pay provided by the resolution of Congress, of the 24th day of August, A. D. 1780, has never been paid but is still due. He asks that a bill for the payment thereof, with interest, to the legal representatives of David Noble, or such other bill as may be proper, shall be reported to Congress.

The resolution of August 24, A. D. 1780, is as follows: "That the resolution of the 15th May, 1778, granting half pay for seven years to the officers of the army who should continue in service to the end of the war, be extended to the widows of those officers who have died or shall hereafter die in the service, to commence from the time of such officer's death, and continue for the term of seven years; or if there be no widow, or in case of her death or intermarriage, the said half pay to be given to the orphan children of the officer dying as aforesaid, if he shall have left any; and that it be recommended to the legislatures of the respective States to which such officers belong to make provision for paying the same on account of the United States."

The resolution of May 15, A. D. 1778, is as follows: "That all military officers commissioned by Congress, who now are or hereafter may be in the service of the United States, and shall continue therein during the war, and not hold any office of profit under these States, or any of them, shall, after the conclusion of the war, be entitled to receive annually, for the term of seven years, if they live so long, one-half of the present pay of such officer: provided, that no general officer of the cavalry, artillery, or infantry, shall be entitled to receive more than the one-half part of the pay of a colonel of such corps respectively; and provided that this resolution shall not extend to any officer in the service of the United States, unless he shall have taken an oath of allegiance to, and shall actually reside within, some one of the United States."

By the resolution of August 24, A. D. 1780, the restricting clause of the resolution of May 15, A. D. 1778, "and not hold any office of profit under these States, or any of them," was repealed.

The petitioner, *as the grandson* of David Noble, can have no claim against the United States under these resolutions. If it be true that David Noble was a captain, duly commissioned by Congress, in the military service of the United States in the revolutionary war, and that he died in the service in the year 1776, his widow, if she were living and unmarried on the 24th day of August, A. D. 1780, was

entitled to the benefit of the resolution of that date; or, if she were then dead or married, it devolved upon his *orphan* children, if he left any; or, if she were then living and unmarried, but died or intermarried before the expiration of seven years from the death of her husband, "the said half pay" then passed to such orphan children. There is no allegation in the petition and no proof on file in relation to these points. If the widow became entitled to the half pay, then her personal representative, if she be dead, is the proper person to assert the claim. If she did not become entitled to it, and there were orphan children, they or their personal representatives are the proper parties to assert the claim. The petitioner may be the grandson of David Noble, and yet in no way interested in it.

But if the parties were now before us, and it were shown by the evidence that the claim was originally well founded, still we could not allow it.

On the 2d day of November, A. D. 1785, Congress passed the following resolution: "That all persons having claims for services performed in the military department, be directed to exhibit the same for liquidation to the commissioners of army accounts on or before the 1st day of August, ensuing the date hereof, and that all claims under the description above mentioned, which may be exhibited after that period, shall forever thereafter be precluded from adjustment or allowance, and that the commissioner of army accounts give public notice of this resolve in all the States for the term of six months."—(4 Journals of Congress, 603.)

On the 23d day of July, A. D. 1787, Congress passed the following resolution: "That all persons having unliquidated claims against the United States, pertaining to the late commissary's, quartermaster's, hospital, clothier's, or marine department, shall exhibit particular abstracts of such claim to the proper commissioner appointed to settle the accounts of those departments within eight months from the date hereof; and all persons having other unliquidated claims against the United States shall exhibit a particular abstract thereof to the Comptroller of the Treasury of the United States within one year from the date hereof; and all accounts not exhibited as aforesaid shall be precluded from settlement or allowance."—(Ibid., 762-'3.)

The first section of the act approved March 23, A. D. 1792, chap. 11, is as follows: "That the operation of the resolutions of the late Congress of the United States, passed on the second day of November, one thousand seven hundred and eighty-five, and the twenty-third day of July, one thousand seven hundred and eighty-seven, so far as they have barred or may be construed to bar the claims of any widows or orphans of any officer of the late army to the seven years' half pay of such officer, shall, from and after the passing this act, be suspended for and during the term of two years."—(1 Stat. at Large, p. 243-'4.)

By the act of Congress approved February 12, A. D. 1793, chap. 6, it was provided as follows: § 1. "That all claims upon the United States for services or supplies, or for other cause, matter, or thing furnished or done previous to the fourth day of March, one thousand seven hundred and eighty-nine, whether founded upon certificates, or

other written documents from public officers, or otherwise, which have not already been barred by any act of limitation, and which shall not be presented at the treasury before the first day of May, one thousand seven hundred and ninety-four, shall forever after be barred and excluded from settlement or allowance: *Provided*, That nothing herein contained shall be construed to affect land office certificates, certificates of final settlement, indents of interest, balances entered in the books of the Register of the Treasury, certificates issued by the Register of the Treasury, commonly called registered certificates, loans of money obtained in foreign countries, or certificates issued pursuant to the act entitled 'An act making provision for the debt of the United States:'. *And provided further*, That nothing herein contained shall be construed to prohibit the proper officers of the treasury from demanding an account or accounts to be rendered for any moneys heretofore advanced and not accounted for, or from admitting, under the usual forms and restrictions, credits for expenditures equal to the sums which have been so advanced."—(1 Stat. at Large, p. 301.)

It is apparent that unless there be circumstances connected with this claim to take it out of the operation of these resolutions and enactments, it is barred by them.

For these reasons, we are of the opinion that the petitioner is not entitled to relief.

Hazen's regiment, in the continental line, and served therein to the close, or until discharged by Congress; and that the before mentioned claim is founded on a resolution of Congress, passed the 15th day of May, 1778, which provides that those soldiers who enlisted for and during the war, and continued in its service until its termination, were entitled to the reward of eighty dollars; and for which, your petitioner is informed, a certificate issued, bearing interest at the rate of six per cent., on or about the first day of March, 1784, which certificate, if ever delivered, is now lost; and that said reward has never been paid or transferred, as your petitioner is informed, and verily believes true.

Your petitioner therefore prays that this honorable Court will examine into the justice and equity of said claim, and report a bill to Congress for the payment thereof, with interest, unto the legal representatives of the said soldier, or such other order or bill as shall seem fit and proper in the premises.

And your petitioner, as in duty bound, will ever pray.

PHILIP LAMOY.

Dated ROUSE'S POINT, *September 4*, A. D. 1856.

STATE OF NEW YORK, }  
County of Clinton. } ss.

Philip Lamoy, of Mooers, in the county of Clinton, in the State of New York, being duly sworn, doth depose and say, that the petition above, by him subscribed, contains the truth according to the best of his knowledge, information, and belief.

PHILIP LAMOY.

Sworn and subscribed before me, this 5th day of September, A. D. 1856.

M. VAN DERVORT,

*Justice of the Peace.*

### IN COURT OF CLAIMS.

PHILIP LAMOY and others, }  
vs. } Claimants' points and brief.  
THE UNITED STATES. }

1. This claim, like the claims of officers under the resolutions of the 21st of October, 1780, and March 22, 1783, must be regarded as in the nature of an express contract.—(See Mayo & Moulton, Introduction, vii, page 177.)

This claim is founded on the resolution of Congress of 15th of May, 1778, and entitled the ancestor of claimants to the reward of \$80, for services rendered, and continued to the end of the war. Here was work, labor and services performed, as the consideration for the reward, and the books show him entitled to the certificate, on the 1st day of March, 1784, and does not show it paid.

2. As a debt or claim due, and payment withheld, all the legal

consequences attach between the United States and the claimants, as in the case of individuals, as it respects the claim of interest.

And Congress designed that interest should be paid "on all claims and to all creditors of the United States from the time payment became due."—(See Compend. &c., on revolutionary claims, document No. 42, for 1837-'38.)

3. Congress has acknowledged the obligation to pay the *principal* in an analogous case.—(See Colin McLaughlin's bill, 249, passed 2d ses. 21st Congress; report 1st ses. 21st Cong., No. 194, as follows:

*Report.*

"The petitioner claims, and satisfactorily proves, that by his services as a sergeant in Col. Moses Hazen's regiment in the army of the revolution, to the end of the war, (having then been discharged and honored with the badge of merit,) he became entitled to the reward of \$80, offered by the resolve of Congress of May 15, 1778.

"The only question remaining is, whether he received this reward?

"No register or other evidence has been found showing that it has ever been paid. The petitioner has made oath, in an accompanying affidavit, that he has never received it.

"The character of the petitioner for veracity is supported by certificates of respectable individuals acquainted with him.

"The committee believe, under view of all the evidence, that it would be unjust to withhold the reward from him, and therefore report a bill directing the payment to him of the original sum of eighty dollars."

C. K. AVERILL,  
*Attorney for Claimant.*

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PHILIP LAMOY vs. THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

The claimant describes himself as one of the heirs-at-law of Robert Paul, late a soldier in the army of the revolution. This claim should have been preferred by the administrator, but without delaying the case for the purpose of having this amendment made, we shall proceed and examine it upon its merits.

The following facts are stated in the petition: Robert Paul died in the year 1814. He enlisted to serve during the war of the revolution in Colonel Hazen's regiment, and continued therein until the close of the war, or until discharged by Congress. The claim is founded on the resolution of Congress of May 15, 1778, which provides that soldiers who enlisted to serve during the war, and continued in service until its termination, should be entitled to a reward of \$80. The petitioner states that he is informed that, for this sum, a certificate issued, bearing interest at the rate of six per cent., on or about the first day of March, 1784, which certificate, if ever delivered, is now lost, and that this reward has never been paid or transferred.



It appears from the letter of the Commissioner of Pensions, of the 27th of December, 1856, that Robert Paul received on the 1st of March, 1784, a certificate numbered 38,551, for the gratuity of \$80; and the question is, whether this sum of money is now due by the United States?

The claimant alleges that the certificate is now lost. There is no evidence of the loss. It may be assumed, however, that the allegation is true, and that the certificate is lost. None of the statutes of limitation make any mention of lost certificates. The act of April 21, 1794, (1 Stat., 353,) relates to claims for destroyed certificates, and has no application to this case. Final settlement certificates, as we decided in the case of *Grubb vs. United States*, are barred unless presented at the treasury by the 4th of March, 1837. Does, then, the fact that a certificate was lost at some indefinite period between the 1st of March, 1784, and the present time take the case out of the operation of the statute of limitations? We can see no reason why the loss of the certificate should have that effect. It does not appear that any claim was ever presented at the treasury arising out of the loss of the certificate in question. If the loss of the paper removes the bar created by the statute, so far from being a misfortune to the claimant, it is a positive benefit. According to this reasoning, as soon as it was ascertained that the certificate was lost, the claimant might lie upon his oars and postpone making any claim upon the United States for any period, however long. The loss of the certificate may be a sufficient reason for its non-production, but is not a sufficient reason for omitting to make any claim prior to the 4th of March, 1837. If before that period the certificate could not have been produced, and the best evidence laid before the Auditor, it was competent for the claimant to produce evidence of its loss, and as the record showed that a certificate had issued, the party, on producing proper evidence of the loss, would have been excused from producing the certificate. As nothing of the kind appears to have been done, we are of the opinion that the claimant has no cause of action.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

HENRY G. CARSON, ADMINISTRATOR OF CURTIS GRUBB,

*vs.*

THE UNITED STATES.

1. The petition of the claimant.
2. Documents exhibited by claimant in proof, and transmitted to the House of Representatives.
3. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this 7th day of December,  
[L. S.] A. D. 1857.

SAML. H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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IN THE UNITED STATES COURT OF CLAIMS.

HENRY G. CARSON, administrator with the will annexed of Curtis Grubb, deceased, surviving co-partner of the firm of Curtis & Peter Grubb, *vs.* THE UNITED STATES.

*To the honorable the Court of Claims:*

The petition of Henry G. Carson administrator, with the will annexed of Curtis Grubb, deceased, surviving co-partner of the firm of Curtis & Peter Grubb, respectfully represents: That on the 12th day

of April, in the year of our Lord one thousand seven hundred and seventy-six, the said Curtis Grubb entered into a contract, as follows:

"It is agreed between Curtis Grubb, esq., of Cornwall Furnace, on the one part, and Stephen Hopkins, Robert Treat Paine, Andrew Allen, George Clinton, and William Whipple, esqs., a committee appointed by the Congress to contract for the making cannon, on the other part, that the said Curtis Grubb shall make one hundred tons weight of cannon for said Congress, for the use of the United Colonies, of such dimensions as shall be given him, to be delivered on navigable water in Philadelphia, or some part of them in Maryland, as may be directed, for which the said committee agree, in behalf of the said Congress, to pay the said Curtis Grubb at the rate of forty pounds, Pennsylvania currency, for each ton of good substantial cannon so made and delivered, and at the rate of the customary price for each ton of shot delivered as aforesaid, fifty to be made to suit each cannon; said cannon to be made and delivered as soon as may be, and the Congress to be at the expense of powder for proving the cannon.

"Witness our hands, this 12th day of April, 1776.

"STEP. HOPKINS,  
"ROB. TREAT PAINE,  
"GEO. CLINTON,  
"WM. WHIPPLE."

And that on the third day of August, in the year of our Lord one thousand seven hundred and eighty, the said Curtis Grubb & Peter Grubb made and entered into an agreement, as follows:

"It is agreed between Daniel Joy, agent to the Board of War of the United States, and Curtis & Peter Grubb, esqrs., that the said Curtis & Peter Grubb shall, in the shortest time possible, cast—

"No. ——— ten-inch shells.

"No. ——— eight-inch shells.

"Four thousand nine hundred shot, twenty-four-pounders.

"Seven thousand six hundred shot, eighteen-pounders.

"Two thousand ——— shot, twelve-pounders.

"One-third part thereof to be finished by the first day of September next, if practicable, and the residue by the fifteenth day of October next, and sooner, if possible; and the said Daniel Joy, in behalf of the United States, in consequence of the authority given to him by the said board, in pursuance of the resolutions of Congress on the 24th and 25th of July, agrees that for every ton of shell to be cast as aforesaid, and which shall stand the proof of such trien (trying) as the said board shall appoint for that purpose, the said Curtis & Peter Grubb, or their order, shall be paid by the said board

lawful money in gold or silver, or such a sum of paper money as shall, at the time of payment, be equivalent thereto, and will actually purchase the said sum in gold or silver; one-half to be paid while the casting aforesaid is going on, or at the furthest by the time the contract on the part of the said Curtis & Peter Grubb shall be performed, and the other half within twelve months thereafter, with interest at six per cent. per annum until paid; and for every ton of shot to be

cast as aforesaid the said Curtis & Peter Grubb shall be paid by the said board twenty-three pounds ten shillings lawful money of Pennsylvania per ton, in gold or silver, or such a sum of paper money as shall at the time of payment be equivalent thereto, and will actually purchase the said sum in gold or silver, at the period and in the manner mentioned in regard to the shells. And to prevent any doubt as to the time when the contracts on the part of the said Curtis & Peter Grubb shall be deemed to be performed, it is hereby declared that the same shall be so adjudged on the day when the whole quantities of shot and shells contracted for as aforesaid shall be ready for examination, and proof of which the said Curtis & Peter Grubb are to give immediate notice to the said board: *Provided*, That it shall be in the power of the said Board of War to diminish the number of shot and shells above contracted for by any quantity not exceeding one-fourth part, or to increase them by any quantity not exceeding one-third part of the whole quantities contracted for as aforesaid; the said board, in either case, giving reasonable notice of such alteration, and in the latter allowing, if necessary, a further reasonable time for casting the increased quantities they shall require.

"In witness whereof, the said parties have to these presents set their hands and seals, the third day of August, in the fifth year of our independence, and in the year of our Lord 1780.

"In behalf of the Board of War and Ordnance,

"DANIEL JOY,

"CURTIS GRUBB & PETER GRUBB [L. S.]

"Sealed and delivered in presence of us:

"W. PAINE,

"THOMAS EDWARDS."

And your petitioner would further state, that, from papers now in his possession as administrator as aforesaid, which, at the proper time, if required, he will produce before your honorable Court, that, in pursuance of said agreements, the said Curtis & Peter Grubb did make and deliver, as required by said agreements, large quantities of cannon and shot, and that on a final settlement of their accounts they received what was called a final settlement certificate from Benjamin Stelle, commissioner for settling debts due by the United States in the State of Pennsylvania, which certificate was numbered 265, and dated January 5, 1784, and was for the sum of four thousand one hundred and eighty dollars and fifty-six cents, with interest from the first day of January, 1783, as will more fully appear by reference to the records in the Register's Office at the Treasury Department. Your petitioner states, that the said Curtis & Peter Grubb have both departed this life, and the records show that said certificate is still outstanding and unpaid.

Your petitioner would further state that this claim was first brought to the notice of Congress by a petition from the heirs of Curtis & Peter Grubb, which was presented to the House of Representatives at the second session of the 28th Congress, and at the first session of the 29th Congress, and again at the first session of the 30th Congress; which

said several petitions were presented, the first to the Committee on Revolutionary Claims, the second to the Committee on Claims, and the third to the Committee of Ways and Means. The claim was not reported on by either of these committees, as would appear from the published list of House Claims, vol. 1, p. 776. The heirs having failed to obtain the redress to which he believed them to be entitled from Congress, he applied to the Treasury Department, and an examination of the records of that department showing that a final settlement certificate had been issued to the said Curtis & Peter Grubb, and that the same was outstanding and unpaid, he asked its payment, but was informed that there was no appropriation out of which it could be paid; but the then Secretary of the Treasury caused an estimate to be made for its payment, as part of the recorded debt of the United States, and a letter was addressed to the Hon. R. M. T. Hunter, chairman of the Committee on Finance in the Senate, dated August 27, 1852, asking for the necessary appropriation. The Committee on Finance did not adopt the suggestion of the Secretary of the Treasury, but, on motion of the Hon. Mr. Cooper, an amendment was offered to the general appropriation bill providing for its payment, which was adopted by the Senate, but it did not pass the House of Representatives. The application having failed, your petitioner caused a memorial to be prepared, which was presented to the Senate at the first session of the 33d Congress, and was referred to the Committee on Revolutionary Claims, who, on the 12th of February, 1855, made an adverse report thereon. Your petitioner, believing that the said certificate is unpaid and still due to him as administrator as aforesaid, and that the same has never been in anywise disposed of, but is still the property of the estate, appeals to your honorable Court, and asks such a decision as will secure to him, as administrator as aforesaid, the relief that he seeks.

STEVENS, BAXTER & BRYAN,  
*Attorneys.*

SIMON STEVENS,  
*Attorney in fact for H. G. Carson,  
Administrator C. T. A. of Curtis Grubb, deceased.*

DISTRICT OF COLUMBIA, }  
*Washington county.* }

Before me, the subscriber, a justice of the peace in and for said county, personally appeared Simon Stevens, attorney in fact for Henry G. Carson, administrator with the will annexed of Curtis Grubb, surviving co-partner of the firm of Curtis & Peter Grubb, and being duly sworn says, that the facts set forth in the foregoing petition are true so far as they are stated of his own knowledge, and so far as stated from the knowledge of others he believes them to be true.

SIMON STEVENS.

Sworn to and subscribed before me, this 29th day of January, A. D. 1856.

JOHN S. HOLLINGSHEAD,  
*Justice of the Peace.*

## IN THE COURT OF CLAIMS.

CARSON, ADMINISTRATOR OF GRUBB,

*vs.*

THE UNITED STATES.

Opinion of the Court delivered by Chief Justice GILCHRIST.

The claimant states the following case : On the 12th day of April, 1776, Curtis Grubb, of Cornwall Furnace, in Pennsylvania, made a contract with Messrs. Stephen Hopkins and others, a committee of Congress for making certain cannon. On the 3d day of August, 1780, Curtis and Peter Grubb made a contract with Daniel Joy, the agent of the Board of War of the United States, that they would cast a certain quantity of shot and shells for the United States. The Messrs. Grubb made and delivered large quantities of shot and cannon in pursuance of their agreements, and, upon a settlement of their accounts, they received what was called a "final settlement certificate," from Benjamin Stelle, commissioner for settling debts of the United States in the State of Pennsylvania. This certificate was numbered 265, and dated January 5, 1784, and was for the sum of \$4,180 56, with interest from the first day of January, 1783. The Messrs. Grubb are both dead, and the records show that this certificate is still outstanding and unpaid.

From this statement of the case it is evident that, admitting all the facts stated in the petition to be true, the first question which arises is, whether the claim is not barred by an omission to present it within the time specified by the various statutes of limitation pertaining to this subject.

The first section of the act of February 12, 1793, (1 Stat. 301,) bars all claims upon the United States "for services or supplies, or for other cause, matter, or thing, furnished or done, previous to the fourth day of March, 1789, whether founded upon certificates or other written documents from public officers or otherwise \* \* which shall not be presented at the treasury before the first day of May, 1794." The proviso, however, excepts from the operation of the act, "loan office certificates, certificates of final settlement, indents of interest, balances entered in the books of the Register of the Treasury, certificates issued by the Register of the Treasury, commonly called registered certificates," and some other descriptions of debt.

The act of April 21, 1794, (1 Stat. 353,) relates to claims for destroyed certificates, and has no application to this case.

The fourteenth section of the act of March 3, 1795, (1 Stat. 437,) provides, "that final settlement certificates shall, before the first day of January, 1797, be presented at the office of the Auditor of the Treasury for the purpose of being exchanged for other certificates of equivalent value and tenor, or, at the option of the holders thereof, respectively, to be registered at the said office and returned, and such certificates, if not so presented, shall be forever barred.

The first section of the act of June 12, 1798, suspended the operation of the act of 1795 for one year, so far as related to final settlement certificates, &c., (1 Stat. 562.) The second section allowed the creditors to receive certificates of funded three per cent. stock, upon the liquidation and settlement of such final settlement certificates. The fifth section provides that, after the passage of the act, it shall not be lawful for the officers of the treasury to issue any certificates of registered or unfunded debt.

The first section of the act of April 13, 1818, (0 Stat. 000,) suspended the operation of the acts of 1795 and 1798 for two years. The act of May 7, 1822, suspended them for two years further, and the act of July 11, 1832, (0 Stat. 600,) revived the act of May 7, 1822, for four years, and until the end of the next session of Congress thereafter, which would be until the 4th of March, 1837.

It appears, therefore, that under the act of March 3, 1795, a final settlement would be "barred or precluded from settlement or allowance," unless it were presented at the office of the Auditor of the Treasury on or before the first day of January, 1797. The successive acts which have been referred to extend the time for their presentment and payment at the treasury to the 4th of March, 1837.

Now, it is not proved or alleged that the certificate in the case has ever been presented at the treasury, as required by the act of March 3, 1795. It is consequently "precluded from settlement or allowance," unless there be something in its character which takes it out of the operation of the statutes relating to the subject.

It is contended by the claimant, that the acts of Congress were not intended to bar debts already settled and registered, but only floating and unsettled claims; that this is a transcript from the treasury records, and it is there a registered debt, as appears by the books of the treasury, and that nothing which is on the books is barred by any of the acts.

This view of the case arises, we think, from a misapprehension of the character of what was called the "unfunded or registered debt." The act of February 12, 1793, makes a distinction between "certificates of final settlement," and "certificates issued by the Register of the Treasury, commonly called registered certificates." There is no statute of limitations which bars certificates of the latter class. By the fourteenth section of the act of March 3, 1795, a final settlement certificate might be presented at the office of the Auditor of the Treasury, for the purpose of being exchanged for another certificate of equivalent value and tenor, or, at the option of the holder, to be registered at that office and returned. After it was registered, it became what was called a "a registered certificate." By the second section of the act of June 12, 1798, on the liquidation and settlement of such of these certificates as might be presented at the treasury, the creditors were allowed to receive certificates of funded three per cent. stock of the United States, equal to the indents of interest and the arrearages of interest on the certificates prior to the first day of January, 1791. The fifth section of the act provides, that after the passage of the act it should not be lawful for the officers of the treasury to issue any certificates of registered or unfunded debt. Now there is an evi-

dent distinction between a registered debt and a final settlement certificate. The certificate could be converted into a registered debt, by virtue of the fourteenth section of the act of March 3, 1795, but until that was done, it retained its original character as a final settlement certificate. Nothing has been done to change the character of the certificate in this case. It is said in the argument that it is a registered debt, because it is a transcript from the treasury records. But the record produced purports on its face to be merely an "extract from the list of final settlement certificates issued by Benjamin Stelle, commissioner for settling debts due by the United States in the State of Pennsylvania." It contains no evidence that the certificate was ever presented at the office of the Auditor of the Treasury to be registered.

By a resolution of February 20, 1782, after reciting that it was "necessary to make a settlement of all accounts between the United States and each particular State, and the creditors of the United States within the same," a commissioner for each State was appointed "to liquidate and settle, in specie value, all certificates given for supplies by public officers to individuals, and other claims against the United States by individuals for supplies furnished the army," &c.

By the resolution of February 23, 1785, an additional commissioner was appointed in each of the States of Pennsylvania and Virginia, for liquidating and settling the accounts of individuals against the United States. By the resolution of November 2, 1785, all persons having claims for services performed in the military department were directed to exhibit the same, for liquidation, to the commissioner of army accounts, on or before the first day of August (then) next, and by a resolution of July 23, 1787, such persons were required to exhibit their claims within eight months from that time.

The domestic debt of the revolution was provided for by the act of August 4, 1790—(1 St., 138.) The second section enacted that subscriptions to a loan to the amount of the domestic debt should be received, payable in certificates issued for the debt according to their specie value, and certificates of various descriptions, all specified; among which are "those issued by the commissioners for the adjustment of accounts in the respective States." We have seen that the certificate in question never became a part of the registered debt. The records of the treasury show that it is still outstanding and unpaid. It has never, then, changed its character of a final settlement certificate. If it ever became a part of the funded debt, it is paid; but we have no evidence on the point; but we find nothing to take it out of the operation of the statute of limitations, or to justify us in determining that it is still evidence of a debt against the United States.

We think, therefore, that the claimant has no cause of action.





IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

NATHANIEL WILLIAMS *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief.
3. United States Solicitor's brief.
4. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.

SAMUEL H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

*To the honorable the Judges of the Court of Claims:*

The petition of Nathaniel Williams, of the city of Baltimore, in the State of Maryland, respectfully represents unto your honors:

That this petitioner had for some years been a private in a volunteer company attached to the fifth regiment of the Maryland militia, and, although exempted from the performance of militia duty by holding the appointment of senator in the State legislature during its sessions, he joined his company, then in the service of the United States, and was at the battle of North Point, on the 12th day of September, 1814. He there received a severe and dangerous wound; whereon the surgeon of the regiment reported him to be two-thirds disabled.

The following act of Congress was passed on the 24th of April, 1816:

AN ACT to increase the pensions of invalids in certain cases ; for the relief of invalids of the militia ; and for the appointment of pension agents in those States where there is no commissioner of loans.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all person, of the ranks hereinafter named, who are now on the military pension roll of the United States, shall, from and after the passage of this act, be entitled to and receive, for disabilities of the highest degree, the following sums, in lieu of those to which they are now entitled, to wit: a first lieutenant, seventeen dollars; a second lieutenant, fifteen dollars; a third lieutenant, fourteen dollars; an ensign, thirteen dollars; and a non-commissioned officer, musician, or private, eight dollars per month; and for disabilities of a degree less than the highest, a sum proportionably less.

SEC. 2. *And be it further enacted*, That all persons of the aforesaid ranks, who may hereafter be placed on the military pension roll of the United States, shall, according to their ranks and degrees of disabilities, be placed on at the aforesaid rates of pensions, in lieu of those heretofore established: *Provided*, That nothing herein contained shall be construed to lessen the pension of any person who, by special provision, is entitled to a higher pension than is herein provided.

SEC. 3. *And be it further enacted*, That all laws and regulations relating to the admission of the officers and soldiers of the regular army to be placed on the pension roll of the United States, shall, and they are hereby declared to relate equally to the officers and soldiers of the militia, whilst in the service of the United States.

SEC. 4. *And be it further enacted*, That the Secretary for the Department of War be, and is hereby, authorized and required to appoint some fit and proper person in those States and Territories where there is no commissioner of loans, and also in the district of Maine, to perform the duties in those States and Territories and in said district, respectively, relating to pensions and pensioners, which are now required of said commissioners in their respective States.

Approved, April 24, 1816.

Pursuant thereto the Secretary of War placed this petitioner on the pension roll, by his warrant bearing date the 5th day of July, 1816, as follows:

#### WAR DEPARTMENT.—W. H. C. 622.

I certify that, in conformity with the law of the United States of the 24th April, 1816,

Nathaniel Williams, late a private in the fifth regiment (U. S.) Maryland militia, in the service of the United States, is inscribed on the pension list roll of the Maryland agency, at the rate of \$5 33½

cents per month, to commence on the 13th day of September, one thousand eight hundred and fourteen.

Given at the War Office of the United States, this 5th day of [SEAL.] July, one thousand eight hundred and sixteen.

WM. H. CRAWFORD.

This petitioner further sets forth that, on the 3d day of March, 1819, an act of Congress was passed, which contained the following provisions:

AN ACT regulating the payments to invalid pensioners.

SEC. 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases of application for the payment of pensions to invalids, under the several laws of Congress granting pensions to invalids, the affidavit of two surgeons or physicians, whose credibility as such shall be certified by the magistrate before whom the affidavit is made, stating the continuance of the disability for which the pension was originally granted, (describing it,) and the rate of such disability at the time of making the affidavit, shall accompany the application of the first payment which shall fall due after the fourth day of March next and at the end of every two years thereafter.

This petitioner omitted to furnish the affidavit required, and payment of his pension ceased accordingly.

On the 14th day of July, 1832, the following act of Congress was passed:

AN ACT for the relief of the Invalid Pensioners of the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That an act, entitled "An act regulating the payments to invalid pensioners," approved the third day of March, one thousand eight hundred and nineteen, be, and the same is hereby, repealed.

Approved, July 14, 1832.

This petitioner contends that, upon a fair and rational construction, the act last aforesaid wholly removed the operation of the act of the 3d of March, 1819, and restored, unqualifiedly, former pensioners to the condition they occupied prior to its passage. A different construction was placed upon this repealing act by the pension bureau; and this petitioner has not been paid his pension since the 4th day of March, 1819, his application therefor having been denied.

Now this petitioner claims to be restored to the benefits of the pension roll of the United States, in accordance with the provisions of the acts aforesaid, and also to the arrears of his pension.

This petitioner further states, that he is sole owner of the above claim, and no other person is interested therein.

And as in duty bound will ever pray,

NATHANIEL WILLIAMS, *Petitioner*.

HENRY MAY, *Solicitor for Petitioner*

STATE OF MARYLAND, *City of Baltimore.*

On this 25th day of June, 1855, personally appeared Nathaniel Williams before the subscriber, one of the State of Maryland's justices of the peace for the city of Baltimore, and made oath on the Holy Evangelical of Almighty God that the facts stated in the aforesaid petition are true, to the best of his knowledge and belief.

Sworn to before

EDWARD J. PETERS.

The petitioner hereunto annexes certified copies of the evidence on which his said pension was granted; and also an affidavit of the circumstances attending his case, for the information of the Court.

N. W.

I hereby certify that the accompanying pages, numbered from one to two, inclusive, are truly copied from the originals on file in the office of the Commissioner of Pensions.

L. P. WALDO,  
*Commissioner of Pensions.*

Be it remembered that L. P. Waldo, who has signed the foregoing certificate, is Commissioner of Pensions; and that to his attestations full faith and credit are and ought to be given.

In testimony whereof I have hereunto subscribed my name  
[SEAL.] and caused the seal of the department to be affixed on this twelfth day of June, in the year of our Lord one thousand eight hundred and fifty-five.

GEORGE C. WHITING,  
*Acting Secretary of the Interior.*

STATE OF MARYLAND, *Baltimore, April 18, 1816.*

I certify on honor, that Nathaniel Williams served as a private under my command in a company of the first battalion of the fifth regiment of the Maryland militia, then in the service of the United States, on the twelfth day of September, in the year of our Lord one thousand eight hundred and fourteen; and that said Nathaniel Williams was wounded in the engagement with the British forces at Patapsco Neck, on that day, near North Point.

JOHN REESE,  
*Lieutenant Commander.*

I certify on honor, that John Reese was, on the twelfth day of September, in the year of our Lord one thousand eight hundred and fourteen, lieutenant commander of a company in the fifth regiment of Maryland militia, then under my command, and commanded said company on that day.

JOSEPH STERETT.

STATE OF MARYLAND, *Baltimore, May, 1816.*

This is to certify, that Nathaniel Williams, in the company of lieutenant Commander Reese, in the twelfth [*fifth*] regiment of infantry of the Maryland militia, is now disabled by reason of wounds or other injuries, inflicted while he was actually in the service of the United States, and in the line of his duty, viz :

By satisfactory evidence and accurate examination, it appears that on the twelfth day of September, in the year eighteen hundred and fourteen, being engaged in a contest with the enemy, at or near a place called North Point, Patapsco Neck, in the State of Maryland, he received a bullet wound, deep seated in his hip near the joint ; and that the muscular contractions are thereby materially and permanently injured, and the strength of the limb much reduced ; and he is, in the opinion of the undersigned, thereby, in two-thirds degree, disabled from obtaining his subsistence by manual labor.

WILLIAM OWENS,  
*Surgeon 5th Reg't M. M.*

BALTIMORE CITY, *ss.*

On this 22d day of June, 1855, personally appeared the Hon. John Barney, (formerly a member of Congress and brother-in-law of Mr. Nathaniel Williams,) and made oath on the Holy Evangel of Almighty God that he was a deputy quartermaster general in the army of the United States at the time hereinafter referred to ; that on the second day after the battle of North Point, being the 14th day of September, 1814, the British forces having retreated from before the city of Baltimore, he went down to the battle ground in search of Mr. Williams, represented to have been there wounded ; that he found him in a log cabin near the place of action, severely and dangerously wounded ; that he was disabled from rising, not having had for forty-eight hours any surgical aid ; that he was placed on a bed, put into a horse cart, and in that condition brought up to the city, his family being exceedingly alarmed at the nature of his wound. He continued in a feeble and disabled condition for a long time thereafter.

Sworn to before

EDWARD J. PETERS.

STATE OF MARYLAND, }  
*Baltimore City,* } *ss.*

I hereby certify that Edward J. Peters, esquire, before whom the annexed affidavits were made, and who has thereto subscribed his name, was, at the time of so doing, a justice of the peace of the State of Maryland, in and for the city of Baltimore, duly commissioned and sworn.

In testimony whereof I hereto set my hand and affix the seal of the  
[SEAL.] superior court of Baltimore city, this twenty-fifth day of June, A. D. 1855.

EDWARD DOWLING,  
*Clerk of the Superior Court of Baltimore city.*

## IN THE COURT OF CLAIMS.

NATHANIEL WILLIAMS *vs.* THE UNITED STATES.*Petitioner's Brief.*

The only question in this case is:

Does the act of 14th July, 1832, by repealing the act of 3d March, 1819, revive the act of 24th April, 1816, upon which the petitioner's claim rests.

It will be contended that it does, and the following authorities will be cited and relied on:

"By the repeal of a repealing statute, (the new law containing nothing in it that manifests the intention of the legislature that the former act shall continue repealed,) the original statute is revived."

Dwarris on Statutes, 675 ; 9 Law Lib., 32.

1 Kent's Com., marg. page, 465, top 516, 7th ed.

Case of the Bishops, 12 Coke, 7 ; 2 Institute, 686.

Doe *vs.* Naylor, 2 Blackford, 32.

McNair *vs.* Ragland, 1 Bad. & Dev. Eq. Cas., 525.

Com. *vs.* Churchill, Metcalf, 118.

Wheeler *vs.* Roberts, 7 Cowen, 536.

R. J. BRENT,

H. MAY,

*For Petitioner.*

## IN THE COURT OF CLAIMS.

ON THE PETITION OF NATHANIEL WILLIAMS.

*Brief of United States Solicitor.*

This is a claim for arrears of pension under the act of April 24, 1816.

The claimant was a private in the fifth regiment of Maryland militia, in the late war with Great Britain, and was wounded at the battle of North Point on the 12th September, 1814. He was inscribed on the pension roll on 5th July, 1816. He failed to comply with the requirements of the act of 3d March, 1819, and was dropped from the pension roll in consequence, and has received no payment since.

He claims that the act of 14th July, 1832, which repealed the act of 1819, not only dispensed in future with the biennial certificates therein required, but reinstated him on the rolls without further proof of the continuance of any disability, and entitled him to the pension as if the act of 1819 had never been passed.

The present Chief Justice of the Supreme Court, whilst acting as Attorney General, gave a different construction to the act of 1832. He says, at p. 540 vol. 2 Opinions, "the act of July 14, 1832, does

nothing more than repeal the law of March 3, 1819, and thereby dispenses with the necessity of adducing the proofs of continued disability. It does not restore to the pension roll any one who had been dropped from it, but authorizes the payment to those who were then on the list of pensioners. The latter would have been entitled to receive their pensions upon adducing proof of disability only, without offering the other evidence which was necessary upon the original application for the pension, and the repealing law merely dispenses with the proof of disability, and allows those who were at that time recognized as pensioners to receive payment without it; but it does not restore pensions to persons who, by former omissions of the required proof, had lost the character of pensioners, and were no longer held to be such by the competent authority."

It is true that in an opinion previously delivered, on the 9th December, 1831, *ib.*, p. 478, he says, "an invalid pensioner, who had proved his title to a pension, and been placed on the pension list as such, has omitted for more than two years to produce the proof of two witnesses, as required by the act of March 4, 1819.

"The question is, can he be lawfully dropped from the pension roll on account of this omission? and must he offer again the proof of his title to a pension, as if it were an original application, before it can be paid him?

"I think the act of March 3, 1819, does nothing more than suspend the payment until the proof of the surgeons is produced. In order, however, to entitle him to the pension for the whole of the time past, the proof must apply to his condition as an invalid at the expiration of every two years, and show that at those times his disability continued. But upon offering such proof from two surgeons in the manner prescribed by the act of Congress, he is entitled to the payment of his pension without again producing the evidence which was necessary in the first instance to entitle him to the pension.

"But a long omission to apply for its payment and offer the proof, unless properly accounted for, may furnish grounds for suspicion, and would certainly justify a more rigorous examination into the claims of the applicant."

It is contended, on the strength of this opinion, that the pensioner cannot be lawfully dropped from the roll by reason of the suspension of his proof under the act of 1819, but that, during the existence of this act, his failure to comply with it merely suspended the pay. When the act was repealed, the objections to payment growing out of its existence is removed, and the pensioner becomes entitled to pay as if it had never existed. If this reasoning be just it is of no avail, because we have, in the language already quoted from the same distinguished source, the positive opinion on the exact point here before us directly to the contrary of the conclusions arrived at by reasoning on what is supposed to be his meaning in a case altogether different.

The first opinion is, in effect, that a pensioner who had been dropped under the act of 1819 may be reinstated on satisfactory proof subsequently made that his disability continued at the time he was required to give it at the end of the biennial term, provided the omissions to comply with the law as to time be explained, and there



be no suspicions arising from a long omission, &c. In such a case the operation of the law would be but a suspension of the payment. He says the act of 1832 does nothing more than repeal the law of March 3, 1819, and thereby dispenses with the necessity of adducing proofs of *continued* disability. It does not *restore to the pension roll* any one who had been dropped from it, &c. \* \* The latter (meaning the former) would have been entitled to receive their pensions on adducing proof of *continued* disability," &c. The two opinions are perfectly consistent in requiring proof of the continuing disability to entitle the claimant to be reinstated to the roll. And it is immaterial to the reasoning whether it be called a suspension or dropping. The act of 1832 was not designed to undo what had been done in virtue of the act of 1819, or to release from the effect of what had been done under it, but only to prevent any other act being done under it. If, therefore, the pensioner had been dropped or suspended for non-compliance, he remained in that condition till the disability was shown to continue. The first opinion says that "to entitle him to the pension for the whole of the time past, the proof must apply to his condition as an invalid at the expiration of every two years. There is nothing in the act of 1832 which renders this inapplicable to the claimant now as well as before its adoption, as respects the time under the operation of the act of 1819. The pay was suspended because the presumption was that the disability was removed. The act of 1832 says this shall not be done hereafter, but does not undo the first. No such presumption shall be created *in future*, it says, to suspend pensioners; but acts done under such presumptions in the past remain, and must continue to have effect.

I do not therefore see the least inconsistency in the opinions; but it is immaterial to the question here if they were inconsistent. I could only be said the illustrious author had changed his opinion between December, 1831, and October, 1832. His last opinion is besides being the result of greater reflection than the former, on the precise question, which the first was not.

The construction given to the act of May 31, 1830, (see Opinion of Berrien, 2 Opinions, 350,) proceeds on the same principle.

M. BLAIR.

### NATHANIEL WILLIAMS *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the Court.

The claimant demands the arrears of a pension for about thirty-six years, that is, from the 4th of March, 1819, to the time of filing the petition. He also claims to be restored to the benefits of the pension roll, of which he says he has been illegally deprived.

The petition states that the claimant, being a private in a military company, in the service of the United States, was severely wounded in a battle with the enemy on the 13th of September, 1814; that a

of Congress relative to pensions was passed in 1816, which provided that persons who then were on the military pension roll of the United States, or should afterwards be placed on it, should, according to their ranks and degrees of disabilities, receive certain rates of pensions therein stated, and which declared the pension laws to relate to militia as well as to the regular army.—(2 Stat. at Large, 296.) The petition further states that the claimant was, in pursuance of an act, inscribed on the pension roll by the Secretary of War, at the rate of \$5 33 $\frac{1}{3}$  per month, to commence on the 13th of September, 1814; that on the 3d of March, 1819, an act of Congress was passed which enacted that in all cases of application for the payment of pensions of invalids \* \* \* the affidavit of two surgeons \* \* \* stating the continuance of the disability for which the pension was originally granted \* \* \* should accompany the application of a first payment which should fall due after the 4th day of March next, and at the end of every two years thereafter.—(3 Stat. at Large, 514.)

The petition further states that the claimant omitted to furnish the affidavit of two surgeons of his continued disability, as the statute last above mentioned required; that his pension accordingly ceased; and that, on the 14th of July, 1832, the said statute requiring the affidavit of continued disability as aforesaid was repealed.—(4 Stat. at Large, 9.)

The petition concludes with alleging that said repealing act of 1832 removed the operation of the act of 1819 thus repealed, and restored former pensioners to the condition they occupied prior to the last repealed act; but that a different construction was placed on the repealing act by the Pension Bureau, and that the claimant has not been paid his pension since the 4th of March, 1819, his application therefor having been denied.

The first question which this case presents is, whether the claimant, by omitting to furnish the surgeons' affidavit of continued disability, required by the act of 1819, did not cease to be a pensioner?

This question must be answered in the affirmative. The act of 1819 prescribed a new requisite to the validity of pensions, and that was the biennial affidavit of continued disability to be given by two surgeons. That condition of the law not being complied with by the claimant, the grant of his pension ceased to exist.

The second question in the case is, whether, by the repeal of the act of 1819, the claimant was restored to the pension roll?

This question must be answered in the negative. The act of 1832 was prospective only. It did not avoid the effects produced by the act of 1819 whilst that act was in force. A non-compliance with the requirements of the act of 1819 whilst it was in force excluded the claimant from the pension roll, and no subsequent statute with a retrospective operation only could restore him. All the repealing act of 1832 did was to dispense, after its passage, with the affidavit of continued disability. It left the effects produced by the non-production of such affidavit under the act of 1819 as they were at the time of the repeal.

In 1831, the Secretary of War, in whose department pension laws  
Mis Doc. 117—2

were then executed, made the following decision relative to said act 1819, before its repeal, to wit :

“ WAR DEPARTMENT, *May 11, 1831.*

“Elijah Layton, an invalid pensioner, was paid last to the 4th March, 1819. He was then paid for total disability. Since that time he has received nothing, having never made application. He now applies for his arrearage of pension from March, 1819, to this time. His present certificate shows only half disability.

“By the act of 3d March, 1819, it is provided, that thereafter a certificate of two respectable surgeons, properly certified, should be necessary to authorize the payment of invalid pensions ; and that the same should be repeated every two years. Mr. Layton has failed to comply with this act, and, of course, is excluded from the benefit of the pension heretofore allowed. He must now make out a case *novus*, with certain evidence as to his identity.

“ J. H. EATON

“ P. S. This rule is to be general.”

See the above decision in Mayo and Moulton, 529.

There is an opinion of Chief Justice Taney, then Attorney General, in December, 1831, saying that he thought the act of March 3, 1819, did nothing more than suspend the payment until the proof of two surgeons was produced.—(2 Opinions of Atty. Gen., 478.) But the same Attorney General afterwards, and after the repeal of the act of 1819, when the question before him was precisely the same that is now before this court, gave an opinion in direct opposition to the present claim. That opinion is as follows :

“The act of July 14, 1832, does nothing more than repeal the act of March 3, 1819, and thereby dispenses with the necessity of adducing the proofs of continued disability. It does not restore to the pension roll any one who had been dropped from it, but authorizes the payment to those who were then on the list of pensioners. The law would have been entitled to receive their pensions upon adducing proof of disability only, without offering the other evidence which was necessary upon the original application for the pension ; and the repealing law merely dispenses with the proof of disability, and allows those who were at that time recognized as pensioners to receive payment without it ; but it does not restore pensions to persons who, by former omission of the required proof, had lost the character of pensioners, and were no longer acknowledged to be such by competent authority.”—(2 Opinions of Atty. Gen., 540.)

We are, therefore, of opinion that the repeal of the act of 1819 was no ground for restoring the claimant to the pension roll, or for giving him the arrears of pension claimed ; and that the construction put upon the repealing act of 1823 by the Pension Office is correct.

An order for testimony is refused.

{ CONGRESS, }  
Session. }

SENATE.

{ MIS. Doc.  
No. 118.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*be honorable the Senate and House of Representatives of the United States in Congress assembled :*

ie Court of Claims respectfully presents the following documents  
ie report in the case of

JOSEPH LORANGER *vs.* THE UNITED STATES.

The petition of the claimant.

Opinion of the Court on the petition adverse to the claim.

r order of the Court of Claims.

testimony whereof, I have hereunto set my hand and affixed the  
[SEAL.] seal of said Court, at Washington, this seventh day of  
December, A. D. 1857.

SAMUEL H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

IN THE UNITED STATES COURT OF CLAIMS.

*ie honorable the judges of the Court of Claims :*

ie petition of Joseph Loranger, of the county of Wayne, State of  
igan, respectfully sheweth :

iat at the commencement of the late war with Great Britain, and  
considerable time prior to that event, your petitioner was estab-  
d at the Rapids of the Maumee river successfully prosecuting the  
ness of a merchant and Indian trader, and where he became the  
r and proprietor of a dwelling-house, store, and out-houses, which  
of the value of two thousand dollars and upwards ; that during  
rosecution of the war it became necessary to deposit provisions at  
point for the use of the army under the command of General Hull,

and your petitioner's said buildings were freely appropriated by the agent of the army contractors to that purpose, and a large quantity of provisions were accordingly stored in them. That immediately after the capitulation of Detroit all the buildings were, in consequence of the well known public use to which they had been applied, burnt and totally destroyed by the Indians attached to the British army, by which your petitioner sustained a total loss of said buildings.

That in consequence of this disaster your petitioner was compelled to abandon the place, whereupon he removed to Frenchtown, on the river Raisin, where he recommenced on a scale corresponding with his then reduced circumstances; and he converted the greatest portion of his goods to the purchase of provisions, such as flour, wheat, corn, and oats, which he felt solicitous to keep for the use of the American army, in anticipation that they should be required. That he had them safely stored at Frenchtown in January, 1813, and a few days previous to Gen. Winchester's defeat, when the officers of a detachment of British militia and Indians, then occupying Frenchtown, applied to your petitioner and offered to purchase and pay for said provisions for the use of the British forces, but your petitioner disregarded the liberal offers made him, and the urgent entreaties of these officers, (which gave them great offence;) and your petitioner was influenced in coming to this determination by information, which about this time reached him, that the American army were in great want of provisions; that immediately after General Winchester's defeat, and when the savages commenced the massacre of the Raisin, your petitioner fled, with many other inhabitants, and left all his property (embracing the provisions aforesaid) to the mercy of the enemy. Strongly attached to the American government, and desirous of placing himself in the ranks of his country's defenders, he sought the camp of General Harrison at Upper Sandusky, and tendered his services in whatever line he might be useful. That no sooner did your petitioner leave Frenchtown than his stock of goods, the provisions aforesaid, and the rest of his personal property, to the value of fifteen hundred dollars, were taken, pillaged, and destroyed by the enemy, British and Indians, and they were wholly lost to your petitioner. In consequence of those misfortunes he was impoverished in his circumstances, and he has hitherto obtained no relief for his repeated losses. That your petitioner is sole owner of said claim, and that the action of Congress thereon has been, so far as he is informed, as follows: In the 1st and 2d sessions of the 23d Congress, the petition was presented. On the 7th April, 1834, it was referred to Committee on Claims. On 10th December, 1834, referred to Committee on Claims. In the 33d Congress, 2d session, April 16, 1838, it was, in the Senate, referred to the Committee on Claims, and April 17, the committee were discharged. In 1852, December 13, referred to Committee on Claims. In 1854, December 20, referred to Committee on Claims, and February 1, 1855, a favorable report was made. Wherefore, he prays that relief may be extended to him in the premises. And your petitioner, as in duty bound, &c.

JOSEPH LORANGER,  
By P. J. LORANGER.

A. H. LAWRENCE,  
*Attorney for Petitioner.*

DISTRICT OF COLUMBIA,  
*Washington county, ss.*

On this tenth day of July, A. D. 1855, before me, a justice of the peace in and for said county, personally appeared Philip J. Loranger, a son of the within petitioner, and made oath that the facts therein stated are true, to the best of his knowledge and belief.

J. H. GODDARD, *J. P.*

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JOSEPH LORANGER *vs.* THE UNITED STATES.

Judge BLACKFORD delivered the opinion of the court.

The petition relies upon two claims against the government. The first claim is as follows:

That the claimant, at the commencement of the war with Great Britain, in 1812, was a merchant and Indian trader at the Rapids of the Maumee river; that he owned there a dwelling-house, store, and out-houses, of the value of 2,000 dollars; that it became necessary to deposit provisions at that point for the use of the American army; that said buildings were freely appropriated by the agent of the army contractors to that purpose, and that a large quantity of provisions was accordingly stored in the buildings. The petition also states that immediately after the capitulation of Detroit, (in 1813,) the buildings were, in consequence of the well-known public use to which they had been applied, burned and destroyed by the Indians attached to the British army.

The following is the second claim:

That after said disaster the claimant removed to Frenchtown, on the river Raisin, where he commenced business and purchased provisions, such as flour, wheat, corn, and oats, which he was solicitous to keep for the use of the American army; that these provisions were safely stored at Frenchtown, in January, 1813; that the claimant, a few days before General Winchester's defeat, refused to sell said provisions to British officers and Indians, he being influenced by information that the American army was in great want of provisions; that immediately after said defeat (in January, 1813) the claimant, with many others, fled, leaving all his property (including said provisions) to the enemy; and that no sooner had he left Frenchtown than his said provisions and other personal property, of the value of 1,500 dollars, were destroyed by the enemy.

There is no ground for either of these claims.

The first claim is for the value of the buildings burned by the Indians. The complaint is, that the army contractors had stored provisions for the use of our army in the buildings, which caused them to be afterwards burned by the hostile Indians. The general doctrine is, that a government does not insure the property of its citizens, in time of war, against injuries committed by the enemy. We consider the law to be, that if the government, by its authorized agent, take possession of a private building, and make use of it as a military depot or as barracks, and the enemy, in consequence of such possession and

use, destroy the building while it is so used, the government would be liable to the owner for the value of the building. There would be reason for saying, in such case, that the government had given a character to the property, which, by the usage of civilized warfare, would justify the enemy in destroying it. But it is not shown by the petition before us that the government ever had anything to do with the buildings. The agent of the army contractors was not an agent or officer of the government, with authority to convert a private building into a public military establishment. Besides, it does not appear how the buildings were occupied, or by whom, at the time they were burned, or that they were occupied at all at that time.

There was a statutory provision on this subject enacted in 1816 and amended in 1817, but it required the claims under it to be exhibited within two years after its enactment. That provision was very similar to the general law as we have above stated it to be. (3 Stat. at Large, 263, 397.)

With regard to the second claim, which is for the value of the aforesaid flour, wheat, corn, and oats, the charge amounts to nothing more than that the private personal property of the claimant was in his absence destroyed by the enemy. In such a case as that, it has never been supposed that the injured individual can call upon his government for redress. (Vattel's Law of Nations, book 3, chap. 15, sec. 232 ; Cassius M. Clay's case in this court.) Such wanton destruction of private property by the enemy is one of the unavoidable calamities of war to which the citizens of an invaded country are subject. The government, by acknowledging its liability for such injuries, would take from its citizens one of the strongest inducements they have to protect their property, and furnish the enemy with an additional reason for destroying it.

An order to take testimony in this case is refused.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

R E P O R T .

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

AUGUSTIN DEMERS AND OTHERS, ADMINISTRATORS OF  
FRANCIS CHANDOLET, *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief.
3. Solicitor's brief.
4. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857.

SAML. H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

*To the honorable Judges of the Court of Claims of the United States:*

The petition of Augustin Demers, of Rouse's Point, in the county of Clinton, in the State of New York, a relation and nephew, nearest of kin, of Francis Chandonet, deceased, begs leave respectfully to represent unto this honorable court: That he is interested as nephew, nearest of kin, of the said Francis Chandonet, in a claim which the said Francis Chandonet had against the United States for services in the revolutionary war. That his interest in said claim arises from the consideration that he is the only surviving nearest of kin known to be living of the said Francis Chandonet, who died intestate at Chary, State of New York, on or about the sixth



day of April, A. D. 1810, and in consideration of certain resolves of Congress hereinafter named.

And your petitioner further represents unto this honorable court, that the said Francis Chandonet was commissioned by Congress a lieutenant in the continental service in the revolutionary war, and served as such to the close, or until reduced or retired. That, by a resolution of Congress of October 21, 1780, it was provided that the officers who should continue in the service to the end of the war should be entitled to half pay during life, to commence from the time of their reduction; and by a subsequent resolution of Congress of March 22, 1783, it was further provided that officers then in service, and that should continue therein to the end of the war, should be entitled to receive the amount of five years' full pay in money, or securities on interest at six per cent. per annum, as Congress should find most convenient, instead of half pay promised for life by the resolution of the 21st of October, 1780. That, by a resolution of Congress of March 8, 1785, it was further provided that the officers who retired under the resolve of the 31st of December, 1781, are equally entitled to the half pay or commutation with those officers who retired under the resolves of the 3d and 21st October, 1780.

And your petitioner further represents and shows to this court, that the commutation money, or half pay, provided for in either of the foregoing resolves of Congress, has never been paid, but remains as a claim due to the said Francis Chandonet, next of kin to the said petitioner, from the United States.

And your petitioner further shows to this court, that he made application to Congress in 1854 for this claim, but what particular action was had thereon your petitioner is not informed, except a general act passed in 1855 in respect to commutation, which did not receive the signature of the President, and therefore failed to become a law.

Your petitioner therefore prays that this honorable court will examine into the justice and equity of the said claim, and report a bill to Congress providing for the payment thereof, together with the interest thereon, unto the heirs or legal representatives of the said officer; or such other order or bill as to your honors shall seem fit and proper to report in the premises.

And your petitioner, as in duty bound, will ever pray.

AUGUSTIN DEMERS.

Dated ROUSE'S POINT, *July 31*, A. D. 1855.

STATE OF NEW YORK, }  
County of Clinton, } ss.

Augustin Demers, of Rouse's Point, in the county of Clinton, in the State of New York, being duly sworn, doth depose and say that the petition above, by him subscribed, contains the truth, according to the best of his information and belief.

AUGUSTIN DEMERS.

Sworn and subscribed before me, this 31st day of July, A. D. 1855.

JOHN BULLIS,  
*Justice of the Peace.*

## IN COURT OF CLAIMS.

AUGUSTIN DEMERS, Claimant,  
*vs.*  
 THE UNITED STATES. } Claimant's brief and points.

I. The claim is founded upon a law of Congress. The consideration was for services in part executed, and to be continued to the end of the war ; and the consideration of the contract being complied with by the officer, the obligation to enforce the law now rests with Congress.—(See resolution of Congress, May 15, 1778, Mayo & Moulton's "Pension and Bounty Lands," 3 ; Resolution of August 24, 1780, *ib.* 6 ; Resolution October 21, 1780, *ib.* 7 ; Resolution March 22, 1783, §2, *ib.* 9 ; Resolution March 8, 1785, *ib.* 10 ; *ib.* in the introduction, pages xxi, xlii.)

II. The obligation is acknowledged by repeated precedents on the part of Congress.—(See Captain Gibson and Lieutenant Price's case in October, for relief of, March 2, 1833 ; Mayo & Moulton, 180 ; Lieutenant Wilson's case, act February 27, 1833, his heirs allowed seven years' half pay, with interest ; per Resolution of Congress, August 24, 1780 ; *ib.* 175.)

Doctor Axson's case, act June 15, 1832 ; commutation, with interest ; *ib.* 163.

Captain McDuff's case, act April 2, 1830, section 2 ; land given him, the same as to other captains in the continental line ; *ib.* 148.

Lieutenant Jacob's case, act July 14, 1832 ; commutation and interest allowed him ; *ib.* 167.

Colonel Harrison and Thomas Davenport's cases, act July 14, 1832 ; commutation and interest allowed to heirs ; *ib.* 168.

Colonel Thornton's case, act February 9, 1833 ; commutation and interest to administrators, one-fourth to widow, and residue distributed to persons entitled according to the laws of Virginia, *ib.* 173.

John Thomas and Peter Foster's cases, act March 2, 1833 ; commutation and interest as officers ; *ib.* 178.

Richard Henley courts case, act March 2, 1833 ; commutation to his widow and interest ; *ib.* 178.

Captain Triplit's case, act March 2, 1833 ; commutation and interest ; *ib.* 179.

C. K. AVERILL,  
*Attorney for claimant.*

## IN THE COURT OF CLAIMS.—No. 337.

FRANCIS CHANDONNET'S ADMINISTRATOR *vs.* THE UNITED STATES.

*Brief of Solicitor.*

The petitioner claims that his intestate was an officer of Hazen's regiment in continental service during the revolution, and served to the end of the war ; and he claims the benefits of the resolution of October 21, 1780, granting half pay for life to officers so serving.

I. The claim is barred by limitation under resolutions of November 2, 1785, (4 Journals, 603,) and July 23, 1787, (Id., 762,) and the act of February 12, 1793, (1 Stat., 301.)

II. The evidence does not prove the service alleged. It consists of—

1st. The balloting book of New York. This proves (p. 185) that Chandonnet was allowed land by New York, under the 14th section of the act of the legislature of that State, passed May 11, 1784. But under this section it was not necessary that the officer should have served for any given time. If at any time he had been an officer in the regiment, he was entitled to the quantity of land which he received—1,000 acres. That he is not on the lists of officers deranged, &c., (pp. 91 and 111,) proves nothing in favor of the claimant. The former list does not purport to embrace, and does not, in fact, embrace all officers deranged, as will be seen by comparing it with the list at page 111; and the list on page 111, by the "&c.," does not purport to be confined to any class of officers, and, in fact, embraces officers who served to the end of the war, so that the absence of an officer's name from this list would imply that he did not serve to the end of the war, as much as it would imply that he was not deranged.

The balloting book is at best but secondary evidence. The land seems to have been granted upon a return made by Colonel Hazen, &c.; that return is the evidence which should be produced, or its absence accounted for.

2d. The affidavit of John Montey, a soldier in the same regiment, made in 1854. This soldier is a general witness to prove the claims of some half a dozen officers. This witness is represented to be extremely old. On this account, and as the claim is barred, his deposition is admitted without putting the claimant to the expense of taking it over again, under the rules of the court. The only remark the deputy solicitor makes is as to the utter uncertainty of the memory of man as to services performed by another more than seventy years ago.

3d. The muster rolls and returns in the Pension Office, the 400 volumes of Washington papers in the State Department, which embrace numerous rolls of Hazen's regiment, and the records of the State of New York, would certainly contain, somewhere, some evidence of the service of an officer who had served throughout the revolutionary war; but no evidence from any of these sources is produced.

JNO. D. McPHERSON,  
*Deputy Solicitor Court of Claims.*

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#### AUGUSTINE DEMERS AND ANOTHER, ADMINISTRATORS OF FRANCIS CHANDOLET, DECEASED.

BLACKFORD, J., delivered the opinion of the court.

The petition states that the intestate was a lieutenant in the revolutionary army, and served to the close of the war. That war ended in 1783.

The claim is for the half pay of the intestate for life under the resolution of Congress of the 21st of October, 1780, and for his commutation of five years' full pay under the resolution of Congress of the 22d of March, 1783, with interest.—(3 Journ. Old Cong., 538 ; 4 id., 178.) The petition states the intestate to have died in 1810.

No application is shown to have been made for this claim until 1854, when, the petition states, application was made to Congress. It was, therefore, about seventy years after the claim is said to have accrued, before a demand is even alleged to have been anywhere made. The intestate lived more than twenty-six years after the close of the war, and it does not appear that he ever presented the claim for payment ; nor is there any cause shown for the delay.

The claim is barred by the following statute of limitations :

“ *Be it enacted, &c.*, That all claims upon the United States for services or supplies, or for other cause, matter, or thing, furnished or done previous to the fourth day of March, 1789, whether founded upon certificates or other written documents from public officers, or otherwise, which have not already been barred by any act of limitation, and which shall not be presented at the treasury before the first day of May, 1794, shall forever be barred and precluded from settlement or allowance.” There are some exceptions in this act, but they do not affect this case.—(1 Stat. at Large, 301.)

The claimant, therefore, is not entitled to relief.





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IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled.*

The Court of Claims respectfully presents the following documents as the report in the case of

GEORGE W. DOW AND JOHN H. DITMAS *vs.* THE UNITED STATES.

1. The petition of the claimants.
2. Certified copies of documents from the Treasury Department, transmitted to the House of Representatives.
3. Depositions in behalf of claimants, transmitted to the House of Representatives.
4. Claimants' two briefs.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.

SAMUEL H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

COURT OF CLAIMS.

GEORGE W. DOW and JOHN H. DITMAS, }  
vs. } Petition.  
THE UNITED STATES.

*To the honorable Court of Claims:*

The petition of George W. Dow and John H. Ditmas, of New York, merchants, doing business under the firm of George W. Dow



& Co., respectfully represents that the government of the United States is justly indebted to your petitioners for money had and received of your petitioners, illegally exacted by the collector of the customs at the port of New York, and by him paid into the treasury of the United States, in manner as follows, viz:

In the month of January, 1853, your petitioners, in company with one Charles A. Minton, purchased a quantity of tin, in bars or blocks, usually denominated, among merchants and dealers, "banca tin;" that the said tin was purchased in London, by Maclean, Maris & Co., commission merchants, for account of your petitioners, and afterwards, on or about the 8th day of March, 1853, was shipped by Maclean, Maris & Co., on board of the American ship "Erie," then in the port of London, and bound for New York. That on arrival of the said ship "Erie" at the port of New York, on or about the 23d day of April, 1853, your petitioners made due entry of the said tin, with certain other articles of merchandise, by them imported in the said ship, and on entry of the same, deposited with the collector of the customs at New York a true invoice of the said imports, in which the said tin was specified, and the value thereof at the actual cost of the same at London, as of the date when purchased in January, 1853. And on entry of the same, your petitioners, as required by law, described the tin upon their said entry, and valued the same at the actual cost thereof, which cost was at the time of purchase the actual value of the same at London, viz: £103 per ton, to which cost and value was added, on the entry aforesaid, the proper dutiable charges, commissions, &c.; and one of your petitioners, as the statute required, in all good conscience, did on his oath, on the said entry, declare "that nothing has been on my part, nor, to my knowledge, on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise;" and on or about the 27th day of April, your petitioners deposited with the collector the sum of seven hundred and sixty-four  $\frac{30}{100}$  dollars, (\$764 30,) to secure the payment of the duties that should be found to be due on the imports described in the entry aforesaid, and the collector thereupon gave the usual permits for landing the same, and he directed that one cask of antimony, one case gum myrrh, one case gum tragacanth, and one chest gum shellac, should be sent to the public store for examination by the appraisers, and that the residue of the imports described in the entry aforesaid should be delivered to your petitioners, and said imports were in due time unladen and delivered as directed. On examination at the appraisers' office, by W. Jackson, an assistant, or examining clerk, in the office of the public appraisers, the several articles which had been sent to the office of the public appraisers for examination, were passed at the value specified in the invoice of the same, and he, the said Jackson, knowing that at the time the ship "Erie" sailed from London, viz: in March, 1853, that banca tin was quoted in the London Price Currents at about £119 13s. per ton, wrote upon the invoice, in reference to the tin, as follows: "Added £16 13s. per ton, to make value correct for banca tin in slabs," and dated the same May 5, 1853, and signed

his name W. Jackson; and Mathias B. Edgar, one of the public appraisers, attested such action of his assistant in the usual manner, by adding his signature, "Edgar," thus notifying the collector the examining clerk had reported as above, although, in fact, neither the clerk nor the said appraiser had examined the tin, or made any legal appraisement of the same; and on or about the 12th day of May, the duties imposed by law upon said imports were paid by your petitioners, by paying \$38 05 in addition to the \$764 30 above mentioned.

Your petitioners further show, that on or about the 9th day of May, they were informed by Mr. Odell, the assistant collector, that a penalty had been imposed upon your petitioners, upon their said importation of banca tin, amounting to eleven hundred and five dollars, (\$1,105,) which sum of money, in addition to the legal duties, your petitioners were required to pay, and did pay to the collector aforesaid, on or about the 12th day of May, 1853, in order to obtain possession of their aforesaid imports for the purpose of selling the same for consumption in the United States; protesting, nevertheless, in writing, against the exaction of the said penalty of \$1,105, upon the aforesaid importation of banca tin.

Your petitioners further show, that the aforesaid penalty of \$1,105, was not imposed upon your petitioners by reason of any undervaluation of the said tin, in their invoice or entry, both of which were according to the true and actual cost and value of the imports described therein, nor by reason of any intention of fraud on the part of your petitioners; on the contrary, the said penalty was imposed because the value of the tin at the date of shipment, in March, 1853, as found and reported by W. Jackson, assistant clerk as aforesaid, was more than ten per cent. higher than the value of the same as described in the invoice thereof; which invoice value was the actual cost of the said imports, at London, in January previous, when the same was purchased by Maclean, Maris & Co., as aforesaid; there having been a rise in the market value of that article, in London, equal to about £16 13s. per ton, between the date of the purchase and the shipment of the same.

Your petitioners further say, that there was no error or negligence on their part in making the entry of the imports aforesaid, according to the price and value specified in the invoice of the same, because the act of March 1, 1823, (3d Statutes at Large, 729,) the only act in force for the purpose, requires a "true invoice," (sec. 1,) which "contains a just and faithful account of the actual cost of said goods," &c., (sec. 4,) at the time or times, place or places, when and where procured," &c., (sec. 4;) and such, in strict conformity with the law and the oath prescribed for importers to make, was the invoice and the entry of the imports on which the penalty was imposed. Your petitioners further say, the value specified in the invoice was not, in April and May, 1853, the basis on which to compute the duties, representing as it does the value of the imports, *at the time and place, when and where purchased*; on the contrary, by act of March 3, 1851, (9th Statutes at Large, 629,) the duties are to be estimated on another basis, *it may be higher or lower, viz: the value at the time of exportation*

*in the principal markets*, of the country from whence the goods, wares, or merchandize may be imported.

Your petitioners further say, that upon entry of the imports above mentioned, they did not incur any penalty. They were liable to pay, on making a true entry, a duty of *five per centum ad valorem*, and *no more*, to be estimated upon the value of the imports at the date of shipment, which value, (with certain charges,) to be ascertained under the act of March 3, 1851, (sec. 1,) by the officers of the customs, was made the basis on which to compute the *ad valorem* duty of five per cent., imposed by the tariff act of July 30, 1846, (schedule H.) on "tin in pigs, bars or blocks."—(9 Statutes at Large, 42.) This act of 1851 introduced into the revenue laws a new basis of value, unknown to any prior law, whereon to estimate the duties, viz: the value at the time of exportation.

Your petitioners further say, there is not any law which imposed a penalty of 20 per cent. upon the imports aforesaid, entered as aforesaid. That the act of July 30, 1846, (sec. 8, 9 Statutes at Large, 43,) by which a penalty of 20 per cent. was imposed under certain circumstances therein specified, does not apply to the case of your petitioners, because that act imposed the additional or penal duty of 20 per cent. upon imports, for a valuation in value, of ten per cent. or more, between the value declared on the entry, and the value of such "imports to be appraised, estimated, and ascertained, in accordance with the provisions of *existing laws*;" laws existing on the 30th July, 1846. The laws then existing required the value whereon to compute the duties on imports, to be estimated, ascertained and appraised, as of the value of the imports at the time when purchased. The 8th section of the act of 1846 did not impose a penalty for a variation in value, between the value of the import at the time of *purchase* or *procurement* and the *time of exportation*.

Your petitioners are informed and believe that in the cases of *Greely vs. Thompson* and *Maxwell vs. Griswold*, reported in 10 Howard's reports, (cases in which the importers sought to recover the penal duty of 20 per cent. which had been imposed upon their imports because of a variation of more than 10 per cent. between the value of the imports at the *time of purchase* or *procurement* and the value reported by the appraisers at the *time of exportation*;) the Supreme Court of the United States decided that the 8th section of the act of 1846 referred to goods actually purchased, and to the value of the same at the *time when purchased*, and that it did not justify a penalty for a variation between the value at the *time of purchase* and the *time of exportation*.

Your petitioners further say that the act of 1851, before cited, under which their imports were valued, as of the date when exported, requires the duty to be estimated upon "the actual market value or wholesale price thereof at the period of the exportation to the United States;" and it does not impose any additional duty of 20 per cent., or any penalty whatever, for any variation of any sort between the value declared on the entry and any other valuation.

Your petitioners further say that no part of the duties now claimed has been refunded, and that the said sum of \$1,105 is now due to your

petitioners for their sole benefit; that the same was paid to the collector of the customs on or before the 28th day of May, 1853, under protest in writing; and the said sum of money was, as your petitioners have reason to believe, by the said collector of the customs paid into the treasury of the United States.

Your petitioners further show that on or about the 19th of May, 1853, they made application, by letter, addressed to the Secretary of the Treasury, for relief; and under date of June 1, 1853, the honorable Secretary advised your petitioners "that the department regards the additional duties exacted in such cases as *duties*, and *not penalties*, and therefore does not feel justified in authorizing their remission."

Wherefore, your petitioners say that the aforesaid sum of \$1,105 was illegally exacted; that it is now in the treasury of the United States, without any fault on the part of your petitioners, and that of right the said sum of money is now due and owing by the United States unto your petitioners, and they pray this honorable Court to grant them such relief for the same as this honorable Court may find they are legally entitled unto, to the end that the said sum of \$1,105, with interest thereon from May 12, 1853, may be refunded unto them, together with their costs expended in this suit, and, as in duty bound, will ever pray.

GEORGE W. DOW & CO.

STATE OF NEW YORK, }  
City and County of New York, } ss.

I, George W. Dow, of the firm of George W. Dow & Co., being sworn, says he has read the foregoing, and the facts stated in the petition are true, to the best of his knowledge and belief.

GEORGE W. DOW.

Sworn to before me this 20th day of June, 1856.

GEO. W. MORRELL,  
*Commissioner of Court of Claims.*  
CHARLES E. SHERMAN,  
JOHN ELY,  
*Attorneys for petitioners.*

UNITED STATES COURT OF CLAIMS.

GEORGE W. DOW & JOHN H. DITMAS }  
vs. } No. 646.  
THE UNITED STATES.

*Brief of the Petitioners in reply to the United States Solicitor.*

The United States Solicitor, in behalf of the United States, contended that, "The law expressly requires the importer of goods purchased to show by his invoice the actual cost of the imports; and to set forth, on entry of the same, the invoice cost or value, and, in addition, the fair market value of the imports at the date the same were exported for the United States."

And the Solicitor referred to the 8th section of the act of July 30,

1846, and the decisions in the cases of *Bartlett vs. Kane*, 16 How. R., 263, and particularly to *Stairs vs. Peaslee*, 18 How. R., 521, as his authority for so contending.

In reply, I say, the act of 1846 did not require the importer to declare on his entry the value of the imports *as of the date of exportation*. And so it was decided in the cases of *Thompson vs. Greely* and *Griswold vs. Maxwell*, 10 How. R., 235, 243. And, as to the case of *Bartlett vs. Kane*, I say, the decision in that case does not apply to the case now before this Court, *because* the bark, upon which that case arose, was not imported under the act of 1851, but was imported and entered under the act of 1846, and the prior acts, viz: on the 4th day of October, 1849.—(See 16 How. R., p. 269.)

The case of *Stairs vs. Peaslee* (18 How. R., 521) turned upon questions entirely different from the questions involved in the case now before this Court. In that case the importation came under the act of March 3, 1851.

The goods were imported into Boston from Halifax, but were of the produce or manufacture of Calcutta, and were appraised by the United States appraisers, and re-appraised by merchant appraisers, who appraised the same as of the value thereof in the markets of London and Liverpool.—(p. 524.)

In behalf of the plaintiff it was contended that the imports should have been appraised as of the value of the same at Calcutta —(p. 522.) And, also, that, if liable to any penalty, they were not liable to the penalty imposed under the 8th section of the act of 1846, but to the one imposed under the 17th section of the act of 1842.—(p. 522.)

The Court said:

“This case comes before the Court upon a certificate of division in opinion between the judges of the circuit court of the United States for the district of Massachusetts.”—(p. 524.)

“The case coming on to be tried, it occurred as a question—

“1st. Whether the tariff act of March 3, 1851, repealed so much of all former laws as provided that merchandise, when imported from a country other than of production or manufacture, should be appraised at the market value of similar articles at the principal markets of the country of production or manufacture at the periods of the exportation to the United States.”

“2d. Whether, in estimating the dutiable value of the cutch, the appraisers should have taken the value at the market of Calcutta, or London and Liverpool, or Halifax, at the period of the exportation at Halifax.”

“3d. Whether, if the appraisements were legally made, the additional duty of 20 per centum under the 8th section of the tariff act of July 30, 1846, was rightfully exacted by the defendant.”—(p. 525.)

The Court decided as follows:

“1st. That the tariff act of March 3, 1851, repealed so much of the former laws as provided that merchandise, when imported from a country other than that of production or manufacture, should be appraised at the market value of similar articles at the principal markets

of the country of production or manufacture at the period of exportation to the United States."

"2d. That, in estimating the value of the catch, it was the duty of the appraisers to determine what were the principal markets of the country from which it was exported into the United States, and their decision that London and Liverpool were the principal markets for that article is conclusive."

"3d. The appraisement appearing to have been legally made, the additional duty of twenty per cent., under the 8th section of the tariff act of July 30, 1846, was rightfully exacted by the defendant." (p. 530.)

"The value of the catch, as appraised, exceeded, by ten per centum, the invoice value, whereupon the defendant assessed a duty of ten per centum on the appraised value, and an additional duty or penalty of 20 per centum on the same value, under the 8th section of the tariff act of July 30, 1846."—(p. 524.)

The plaintiff contended the penalty should have been "fifty per cent. of the duty," [see his points,] (the duty being 10 per cent., the penalty contended for was 5 per cent.,) under the 17th section of the act of 1842, instead of 20 per centum under the act of 1846. The decision of the Court is confined to the points to be decided; and, as between a penalty of *five per cent.*, under the act of 1842, or *twenty per cent.* under the act of 1846, the penalty of 20 per cent. was rightfully exacted.

The point, *that no penalty was imposed or to be collected under the act of March 3, 1851, was not raised in that case*, and, as that point was not before the Court, its decision decides no more than the case before them, and the points involved in the same.

In the case of *Stairs vs. Peaslee*, the appraisement appeared to have been legally made.—(p. 530.) In the case of *Geo. W. Dow & Co.*, before this Court, there is no legal appraisement. The points involved, and to be decided, in the two cases, are entirely different. The reasoning of the Court in that case is to be taken in connexion with the points to be decided, and does not apply to another and a different case. In that case (referring to the case of *Bartlett vs. Kane*,) the Court said: "We do not refer to this case as a judicial decision of the question before us, because, although it was in the case, the attention of the Court was not called to it."—(p. 530.)

For the same reasons the case of *Stairs vs. Peaslee* is not a judicial decision of the questions, now before the Court of Claims, in the case of *George W. Dow & Co. vs. The United States*, because the attention of the Supreme Court was not called to the same, but to other questions entirely different. The decision in the case of *Stairs vs. Peaslee* does not conflict with nor overrule the decisions of the same court in *Thompson vs. Greely*, and *Griswold vs. Maxwell*, 10 How. R., pp. 235 and 243. And, therefore, I contend that the decisions of *Thompson vs. Greely*, and *Griswold vs. Maxwell*, and not the decision in the case of *Stairs vs. Peaslee*, are to guide us in coming to a true construction of the law upon the facts presented in the case now before the Court of Claims.

JOHN ELY,  
*Attorney for Petitioners.*

FEBRUARY 26, 1857.

## COURT OF CLAIMS.

GEORGE W. DOW and JOHN H. DITMAS } *Brief of legal points and au-*  
*vs.* } *thorities under Rule XX.*  
 THE UNITED STATES.

The facts of this case, as set forth in the petition and established by the evidence, are as follows :

1853, January. George W. Dow & Co. purchased a quantity of tin in bars or blocks, at £103 per ton.

March 8. The invoice is at that price, and is dated, as usual, at the time of the shipment ; and there was a rise in the market value of the tin between the purchase and shipment of the same.

April 21. Entry was made, as the statute requires, at the true cost, as per invoice, viz : £103 per ton.—(See oath, 3 *Stat at Large*, 721.)

May 5. W. Jackson, C. H. clerk, wrote on the invoice, " added £16 13s. per ton, to make value correct for banca tin," and signed his name " W. Jackson ;" and underneath the appraiser signed his name " Edgar ;" and so notified the collector of their estimate of the value of the tin at the date of shipment, March 8.

Deputy Collector Odell ordered a deposit of \$1,150 to cover penal duty.

May 12. A penalty of \$1,105 was paid under protest

Reference will be made to acts of Congress, as follows :

1st. The act " regulating the collection of duties on imports," &c., approved the 1st March, 1823, (3 *Statutes at Large*, 729,) by sections 1st and 4th, requires the importer, on entry of his imports, to present to the collector the true invoice of the same, and to enter the imports for duty at the actual cost thereof.

2d. By the tariff act of July 30, 1846, (9 *Statutes at Large*, 42, section 1st, schedule H,) a duty of 5 per cent. was imposed upon " tin in pigs, bars, or blocks"—the goods referred to in the petition. And the 8th section of the same act, under the circumstances therein specified, authorized the collector to exact an additional or penal duty of 20 per cent.

3d. The act in force July 30, 1846, was the act of March 1, 1823, and the 16th and 18th sections provide for the appraisement of goods according to the value of the same, *at the time and place when and where purchased.*

The act of March 3, 1851, (10 *Statutes at Large*.) requires the value of imports to be ascertained, as of *the period of their exportation to the United States*, as the true value upon which duties shall be assessed.

The acts above cited should have governed the collector in assessing the duties upon the goods in question.

In behalf of the petitioners it will be contended, on the case shown in the petition and established by the evidence, that the collector erred, in that he exacted an additional or penal duty upon the imports referred to in the petition, imported and entered for duty under the act of 1851.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled :*

The Court of Claims respectfully presents the following documents as the report in the case of

FRANCIS PICARD, ADMINISTRATOR OF PIERRE AYOTT,  
*vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Documentary evidence filed by claimant and transmitted to House of Representatives.
3. Statement of Pierre Ayott's account received from the Treasury Department and transmitted to the House of Representatives.
4. Claimant's brief.
5. United States Solicitor's brief.
6. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

*To the honorable Judges of the Court of Claims of the United States:*

The petition of Francis Picard, administrator of the estate of Pierre Ayott, late of Champlain, in the county of Clinton, and State of New York, begs leave respectfully to represent unto this honorable Court, that he is interested in a claim which the said Pierre Ayott had against the United States, on account of services rendered by the said Pierre Ayott as captain in Hazen's regiment in the revolutionary war ; that his interest in said claim arises from the consideration that he has



been duly appointed administrator of the estate, rights and credits of the said Pierre Ayott, deceased.

And your petitioner further represents that said claim is founded upon a law or resolve of Congress, viz:

“By the United States in Congress assembled, September 14, 1785.

“On a report from the Secretary at War, to whom was referred a memorial of Pierre Ayott:

“*Resolved*, That the commissioner of army accounts, in liquidating the claims of Pierre Ayott, allow him the pay and subsistence of a captain for the year 1776, deducting three hundred dollars advanced him by the resolution of the 24th of February last.

“That the further sum of one hundred and fifty dollars be allowed him in full of all expenses incurred by him in the service of the public. That he be allowed rations until the first day of June next, and that the same quantity of lands be assigned to him as may be assigned to the heads of other Canadian families.

“CHAS. THOMPSON, *Secretary*.”

And your petitioner further represents, that he has caused applications to be made at the Pension Department, at the Third Auditor's Office, at the First Comptroller's Office, and the General Land Office, in the city of Washington, for information whether said claim had ever been paid in pursuance of said resolve, or any part thereof. From the Third Auditor's Office, under date of March 16, 1853, he is informed, through his attorney, that the revolutionary books of said office do not show any payment to Captain Pierre Ayott, of the revolutionary army, (Hazen's regiment,) under the resolve of Congress of September 14, 1785. From the General Land Office, he is informed that, whether any warrant was ever issued to said Ayott, he can obtain the information at the Pension Office, whence all warrants for bounty land emanate; but says: “By reference to the books of this office, no land appears to have been patented to an individual named Pierre Ayott, a captain in the revolutionary war.” From the First Comptroller's Office he is informed that by reason of an act of Congress of February 26, 1853, he could not otherwise than in the discharge of his official duties make the investigation asked for. From the Pension Office, to whom the claim had been referred from the War Department, the nature of the case seems to have been misunderstood; but in conclusion they say: “If any allowance of land has been made to, or in right of, Canadian or Nova Scotia refugees, it must have been so made by special acts of Congress;” to all which answers to said application your petitioner begs leave to refer, and give in evidence in his behalf.

And your petitioner further shows to this honorable Court that no other action has ever been had on said claim, to his knowledge or belief, and that said law or resolution remains unsatisfied in every particular. Your petitioner therefore prays this honorable Court will examine and hear the evidence, and report a bill to Congress for the payment of said claim, together with the interest on the moneys provided for by said resolve from the date thereof until the same shall be

paid, or such other order or bill as to your honors shall seem meet and proper in the premises.

And your petitioner, as in duty bound, will ever pray.

FRANCIS PICARD.

Dated JUNE 13, 1855.

STATE OF NEW YORK, {  
County of Clinton, } ss.

Francis Picard, of Rouse's Point, in said county, being duly sworn, doth depose and say that the petition above subscribed by him contains the truth, according to the best of his information and belief.

FRANCIS PICARD.

Sworn and subscribed before me this 13th day of June, 1855.

JOHN BULLIS,  
Justice of the Peace.

#### COURT OF CLAIMS.

FRANCIS PICARD, Adm'r, &c. *vs.* THE UNITED STATES.

#### *Claimant's brief and points.*

1. This claim is founded on a special resolve of Congress, September 14, 1785.—(See Journals of Congress, 1774 to 1788, vol. 1, p. 570.)

2. The claim being a subsisting one, and no accounting officer acknowledging authority to pay or execute it, provisions should be made by Congress through this Court.

3. The claimant asks the following interpretation of the resolve, as stated in account, viz:

DR.	<i>The United States to Captain Ayott.</i>		CR.
To captain's pay, \$40 per month, for year 1776...	\$480 00	By advance on resolution, February 24, last.....	\$300 00
To subsistence, 3 rations to captain, 30 cents per day .....	109 50		
To expenses incurred.....	150 00		
To rations for 8½ months	76 56		
	<hr/>		
	815 06		
	300 00		
	<hr/>		
	515 06		

To interest.

To U. S. land, 300 acres.—(Resolution of Congress, Sept. 16, 1776.)  
To 1,500 acres.—(Act March 27, 1783, New York.)

C. K. AVERILL,  
Attorney for Claimant.

IN THE COURT OF CLAIMS.—Nos. 22 and 338.

FRANCIS PICARD, *Administrator of PIERRE AYOTT, vs. THE UNITED STATES.*

*Brief of United States Solicitor.*

I. In petition No. 22 the petitioner claims an amount allowed under resolutions of the continental Congress of February 24 and September 14, 1785.

By the resolution of February 24, 1785, it appears that Ayott was present at the place where Congress held its sessions, and petitioned that body for relief. The resolution allowed him the pay of a captain for a period stated, to be credited in his accounts, and authorized him to draw at once \$300 in advance of settlement, to enable him to return to Canada on business. The resolution of September 14, 1785, passed after reference to the Secretary of War, authorized the above, and a further allowance for expenses to be made in the liquidation of Ayott's accounts by the army commissioner.

The petitioner assumes that no part of the allowance above voted has been paid, and that there was nothing to Ayott's debit on the books of the treasury to be deducted in the liquidation of his accounts, except the \$300 advanced as above. He assumes, also, that no settlement ever was made by the army commissioner under the resolutions. He claims the gross amount voted by the two resolutions, without other deduction than the amount advanced under the first.

1. It is extremely improbable that Ayott suffered the balance of the amount voted him to remain undrawn, being on the spot when the resolution passed, and having immediately drawn a part of the allowance (see Register's certificate.) The presumption, from the lapse of time, and, still stronger, from the circumstances, is, that he drew all that was due him as soon as the settlement could be made. It is not conceivable that a person who had taken the trouble to prosecute his claim personally before Congress, and had obtained its allowance during his attendance upon that body, and had even received a part, as earnest money, pending the statement of his account, should go off and never apply for the balance. Ayott lived till 1814. If he got no more it was because, on the liquidation of his claims directed to be made by the resolution, nothing more was found due. Rations were authorized by the same resolutions, and it is not claimed that he did not draw them.

2. But there was a settlement, and he was paid. The Third Auditor's report to this Court, and letter to Averill, the petitioner's attorney, shows that two accounts were settled with Ayott. When they were settled he does not state; but the Third Auditor is the successor of the commissioner of army accounts, and no doubt the settlements reported were those made by him on his books; Ayott's account stands closed.

3. The claim is barred by the act of February 12, 1793.—(1 Statutes, 301.)

II. He claims in petition No. 22, land under the resolution of September 14, 1785.

1. That resolution only placed him upon the same footing with other Canadian refugees, and in common with them his case was provided for by the act of April 7, 1798.—(1 Stat., 547.)

2. The resolution of April 23, 1783, promised to reward the Canadian refugees by a provision of land, and that promise was carried out by the act above cited. In the 4th section it provides for a board consisting of the Secretary of War, the Secretary of the Treasury, and the Comptroller of the Treasury. They were directed to take into consideration losses and sufferings sustained, and services performed, and to make allowance in land therefor, deducting any allowance already made by individual States. The petitioner's attorney cites the balloting book of New York, showing that Ayott received land from that State, and if he never prosecuted his claim under the act of 1798, and other acts extending it, (cited in foot note thereto, 1 Stat., 547,) it unquestionably was because he had already received as much land from New York as he could have claimed under the act from the United States.

3. All such claims are now barred by limitation under the acts above cited in regard to this subject.

III. In petition No. 338, the petitioner claims the half-pay or commutation due a continental officer under the resolution of October 21, 1780, and March 22, 1783.

There is no evidence that he ever was regularly commissioned in Hazen's or any other regiment. He raised and commanded a company in Canada in 1775-'76, the time for which Congress paid him by resolutions above cited; but the terms of the first resolution imply that he was not commissioned. He was left behind in the retreat of the American army in 1776, and was probably captured and imprisoned, as Congress made compensation for imprisonment. All the certificates of the military officers speak of his service in Canada in 1775-'76; none of them speak of any service elsewhere; and this almost conclusively negatives his claim of having served after the retreat of the army from Canada; for these certificates were given in 1784. The only evidence offered to prove the alleged service are those of private persons who could have had no proper opportunity of knowing the exact nature of his connexion with the service. His step-daughter's testimony seems to show that he was a scout, spy, or secret agent. An officer in the continental service could not have gone into Canada and there publicly married a Canadian woman, after bans there published, as Ayott did in 1779.—(See extract from parish register.) It was not till after this that he was forced to fly from Canada.

The evidence utterly fails to show that he remained a captain in continental service till the close of the war. It is not alleged that he was discharged.

IV. He claims indemnification for losses incurred in consequence of his adherence to the cause of the colonies.

On this point I refer to remarks above on his claim (II) for land under the resolution of September, 1785.

V. He claims the bounty land due a continental officer under resolutions of September 16, 1776.

1. The Department of the Interior has authority to adjust such claims under the act of February 8, 1854, (10 Stat., 267,) and the claim should first be presented there.

2. The administrator cannot recover bounty land; it descends as real estate.—Opinions of Attorney General Taney, of October 25, 1832, and September 5, 1833.)

Much of the evidence offered is inadmissible under the rules of this Court.

JOHN D. McPHERSON,  
*Deputy Solicitor Court of Claims.*

#### IN THE COURT OF CLAIMS.

FRANCIS PICARD, Adm'r of Pierre Ayott, dec'd, *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

The petitioner states that he, in his representative character, is interested in a claim which his intestate had against the United States on account of services rendered by him as a captain in Hazen's regiment in the revolutionary war, founded on the following resolutions of Congress, passed September 14, A. D. 1785:

"That the commissioner of army accounts, in liquidating the claims of Pierre Ayott, allow him the pay and subsistence of a captain for the year 1776, deducting 300 dollars advanced him by the resolution of the 24th of February last.

"That the further sum of 150 dollars be allowed him in full of all expenses incurred by him in the service of the public.

"That he be allowed rations until the 1st of June next, and that the same quantity of lands be assigned to him as may be assigned to the heads of other Canadian families."—(4 Journals of Congress, p. 570.)

The petitioner alleges that these resolutions remain unsatisfied in every particular. He prays this Court to report a bill to Congress for the payment of his claim, with interest on the money provided for in the above resolutions, from their date till payment, or such other bill as may be proper in the premises.

As the petitioner can have no interest in the land which Congress directed to be assigned to his intestate, the *real*, and not the *personal*, representatives of Pierre Ayott being the proper parties to prosecute a claim therefor, it is to be inferred from the petition that he sets up no claim thereto. If he did, the question would then arise whether it is barred by the act of April 7, A. D. 1798, and the act of February 25, A. D. 1810.—(1 Stat. at L., pp. 547-'48-'49; 2 Stat. at L., pp. 556-'57.)

The Solicitor of the Treasury, in a communication from him to the Secretary of the Treasury, of the 28th day of June, A. D. 1857, says: "The accounts current of the officers of the revolution have been

destroyed in the burning of the public building. The revolutionary books of this office, however, show that he [Pierre Ayott] had an account with the government, which stands settled and closed on the books."

The Acting Third Auditor, in a letter from him to C. K. Averill, the counsel for the petitioner, dated September 8, A. D. 1856, states as follows: "He [Pierre Ayott] is shown to have had accounts with the government, in the first of which he is charged as follows: To Jonathan Trumbull, \$46; and is accredited, By United States, for pay, \$46. In the second account he is credited, By pay of the army, \$454 12; and is charged, To certificates issued, \$454 12. The journal that would contain the entries of the second account has been lost or destroyed."

There is also on file a duly certified statement from the revolutionary records of the Register's office, in which there is, on the debit side, a charge against him as of the 14th day of April, A. D. 1785, for treasury warrants, \$300; and, on the credit side, a credit in his favor for balance, \$300. The credit does not seem to be dated. The debit may have been for the \$300 ordered to be advanced to him by the resolution of February 24, A. D. 1785.—(4 Jour. of Cong. 474.) If it was, then, inasmuch as the resolution of the 14th of September, A. D. 1785, directs the \$300 so advanced to be deducted from the pay and subsistence as a captain for the year 1776 thereby allowed him, it is not probable that the credit in the above statement was made on the 14th day of April, A. D. 1785, but afterwards, and after the 14th day of September, A. D. 1785.

It appears from the evidence that Pierre Ayott lived till the year 1814.

We do not think that the evidence sustains the petitioner's claim. On the contrary, the presumption fairly deducible therefrom is, that it has been satisfied. His intestate's accounts with the United States have been stated and settled, and the presumption of law is that every item of charge to which he was entitled was allowed him. There is nothing in the circumstances of this case to rebut or even weaken this presumption. On the contrary, it is very much strengthened by those circumstances, especially the fact that the testator lived twenty-nine years after the last resolution of Congress, and probably as long after the adjustment of his accounts, without setting up any claim in the premises.

But, in addition to these considerations, the present claim is barred by the act of February 12, A. D. 1793.—(1 Stat. at L., p. 301, ch. 5.)

We are of the opinion that the petitioner is not entitled to relief.



IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.  
DECEMBER 18, 1857.—Referred to the Committee of Claims.



The COURT OF CLAIMS submitted the following

**REPORT.**

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

**ELIZA SHAFFER vs. THE UNITED STATES.**

1. The petition of the claimant.
2. Opinion of the Court on the petition adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.

**SAMUEL H. HUNTINGTON,**  
*Chief Clerk Court of Claims.*

IN THE UNITED STATES COURT OF CLAIMS.

DISTRICT OF COLUMBIA, }  
Washington County. }

*To the Honorable the Judges of the Court of Claims:*

The petition of Mrs. Eliza Shaffer, widow of Jonathan Shaffer, and the only surviving child and heir at law of Christian Orendorff, deceased, who was a captain in the Maryland line of the revolutionary army, respectfully represents, that on a final settlement of accounts between her deceased father and the government of the United States, the government was justly indebted to him in the sum of twenty-eight dollars and thirty cents; for which a final settlement certificate, dated January 6, 1783, was issued to her said father. Petitioner would represent that said certificate was never paid the said Christian Orendorff in his lifetime, nor has it been paid his legal representatives since his death; but the said sum, with legal interest thereon from date, is now justly due your petitioner; which sum the said government hath refused



and still doth refuse to pay in whole or any part thereof, to the damage of your petitioner two hundred dollars. Wherefore she brings this suit and prays your honorable court to report a bill for her relief, appropriating the sum of twenty-eight dollars and thirty cents, with interest thereon, at six per cent. per annum, from January 1, 1783, till paid, in liquidation of said certificate, which has been lost or destroyed, and cannot now be produced by your petitioner.

She would further represent that an application was made to the House of Representatives at the 2d session of the 28th Congress for relief, which application was referred to the Committee on Revolutionary Claims, and on the 15th day of February, 1845, the said committee made the following report, with the accompanying bill :

Mr. R. SMITH, from the Committee on Revolutionary Claims, made the following

#### REPORT :

*The Committee on Revolutionary Claims, to whom was referred the memorial of Jonathan Shaffer, asking payment for a lost final settlement certificate issued to Christian Orendorff, report :*

That they have examined the same, and herewith submit the certificate of T. L. Smith, Register of the Treasury, in relation to this claim, and make it a part of this report.

Number.	Letter.	Date of certificate.	To whom due.	When became due.	Amount of certificate.
86,423	A	Jan 1, 1783	Christian Orendorff.	Mar. 16, 1782.	\$28 30

TREASURY DEPARTMENT,  
*Register's Office, April 20, 1842.*

I certify the above to be a true extract from the record of final settlement certificates issued by John Pierce, commissioner for settling the army accounts of the Revolution, and the certificate above referred to to be outstanding and unpaid.

T. L. SMITH, *Register.*

From the above certificate, it appears that this claim is outstanding and unpaid ; the committee, therefore, report a bill providing for the payment of the said certificate, with interest on the same.

Mr. R. SMITH, from the Committee on Revolutionary Claims, reported the following bill :

A BILL for the relief of the legal representatives of Christian Orendorff.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the*

Treasury be, and he is hereby, required to pay to the legal representative of Christian Orendorff, an officer in the revolutionary war from the State of Maryland, a final settlement certificate, issued to said Orendorff for the sum of twenty-eight dollars and thirty cents, with interest from the date thereof, at six per centum per annum till paid, out of any money in the treasury not otherwise appropriated: *Provided, That,* before such payment shall be made, the said legal representatives shall execute a bond, with good and sufficient security, to be approved by the said Secretary of the Treasury, in double the amount of the sum to be paid to him, to indemnify the United States against the legal claim of any person or persons for payment of the said certificate alleged to have been lost or destroyed.

Your petitioner would further represent that no final action was had on said bill. The application, however, was renewed several times before subsequent Congresses, but only one other report was ever made thereon, and that was adverse to the claim.

ALEX. H. EVANS,  
*Attorney for Claimant.*

DISTRICT OF COLUMBIA, {  
Washington County. }

Personally appeared before the undersigned authority, a justice of the peace in and for said district and county, Alexander Ray, who, after being duly sworn, makes oath and says that the facts set forth in the foregoing petition are true, to the best of his knowledge and belief.

Subscribed and sworn to this                      day of                      1855.

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ELIZA SHAFFER vs. THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

The petitioner states that she is the only surviving child and heir at law of Christian Orendorff, deceased, formerly a captain in the Maryland line of the revolutionary army, and that, on a final settlement of accounts between him and the government of the United States, there was due him the sum of \$28 30, for which a final settlement certificate was issued to him, dated on the 6th day of January, 1783. The amount due on this certificate has never been paid. The House Committee on Revolutionary Claims, in the year 1845, made a favorable report on the claim, stating that it was still unpaid, and reporting a bill for the relief of the petitioner.

We have recently had occasion to consider, in the case of Carson, administrator of Grubb vs. the United States, the statutes of limitation relating to final settlement certificates. These statutes are referred to in the judgment pronounced in that case. By the 14th section of the act of March, 1795, (1 St., 437,) if such certificates are not presented at the office of the Auditor of the Treasury, &c., by the 1st day of January, 1797, they are to be barred. The operation of this act was

suspended by various subsequent statutes until the 4th of March, 1837.

By the act of March 3, 1847, (9 Stat., 163,) an appropriation is made as follows: "To reimburse the owners the principal specie value of loan office and final settlement certificates which may be produced and exhibited, the sum of \$5,000." Now this appropriation is applicable to the payment of such certificates only as may be produced and exhibited, and cannot be applied to the payment of lost or destroyed certificates. The words "produced and exhibited" constitute an express limitation of the class of which payment may be made, and, unless they are rejected entirely, lost and destroyed certificates do not come within the statute.

It is not alleged that this certificate was ever presented at the treasury, according to the provisions of the acts of 1795 and 1847. It is therefore precluded from settlement or allowance by the express words of the act, and consequently the petitioner has no cause of action against the United States.

IN THE SENATE OF THE UNITED STATES.

DECEMBER 10, 1857.—Received.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

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The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

FRANCIS PICARD, ADMINISTRATOR OF PIERRE AYOTT, *vs.*  
THE UNITED STATES.

1. The petition of the claimant.
2. Report of the Third Auditor of the Treasury, transmitted to the House of Representatives.
3. Claimant's brief.
4. United States Solicitor's brief.
5. The opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of December, A. D. 1857.

SAML. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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*To the honorable Judges of the Court of Claims of the United States:*

The petition of Francis Picard, of Rouse's Point, in the county of Clinton, in the State of New York, administrator of the estate, rights, and credits of Pierre Ayott, deceased, begs leave respectfully to represent unto this honorable Court that he is interested as administrator of the estate, &c., of the said Pierre Ayott in a claim which the said Pierre Ayott had against the United States for services in the revolutionary war.

That his interest in said claim arises from the consideration that

he is administrator of the estate, rights, and credits of the said Pierre Ayott, who died intestate on or about the ——— day of ———, A. D. 1814; and in consideration of certain resolves of Congress hereinafter named.

And your petitioner further represents unto this honorable Court, that the said Pierre Ayott was commissioned by Congress a captain in the continental service in the revolutionary war, and served as such to the close, or until reduced or retired. That, by a resolution of Congress of October 21, 1780, it was provided that the officers who should continue in the service to the end of the war should be entitled to half-pay during life, to commence from the time of their reduction; and by a subsequent resolution of Congress of March 22, 1783, it was further provided that officers then in service, and that should continue therein to the end of the war, should be entitled to receive the amount of five years' full pay in money, or securities on interest at six per cent. per annum as Congress should find most convenient, instead of half-pay promised for life, by the resolution of the 21st of October, 1780. That, by a resolution of Congress of March 8, 1785, it was further provided, that the officers who retired under the resolve of the 31st of December, 1781, are equally entitled to the half-pay or commutation with those officers who retired under the resolve of the 3d and 21st October, 1780.

And your petitioner further represents and shows to this Court, that the commutation money, or half pay, provided for in either of the foregoing resolves of Congress has never been paid, but remains as a claim due to the said estate of the said Pierre Ayott from the United States.

And your petitioner further states that the United States is justly indebted to the estate of the said Pierre Ayott; for, at the breaking out of the revolutionary war, the said Pierre Ayott was an inhabitant of Canada, and the owner of two lots of land of the value of \$4,000, which was confiscated, in consequence of his having taken up arms against Great Britain and in favor of the American cause, which was induced by the promises of protection and remuneration by Congress and its agents at the time; and, subsequently, by resolves of Congress of the 23d of April, 1783; and of the second Congress in the second session promising the same, which resolutions are more particularly set forth in the former petition to Congress, and to which your petitioner begs leave to refer and make a part of this case. And your petitioner further states, that he presented the above claims to Congress in two petitions in 1854, but what action was had thereon he is not informed.

Your petitioner therefore prays that this honorable Court will examine into the justice and equity of the said claim, and report a bill to Congress providing for the payment thereof, together with the interest thereon, unto the heirs or legal representatives of the said officer; or such other order or bill as to your honors shall seem fit and proper to report in the premises, with the reasonable interest thereon.

And your petitioner as in duty bound will ever pray.

FRAS. PICARD.

Dated ROUSE'S POINT, *July 30, A. D. 1855.*

STATE OF NEW YORK, }  
 County of Clinton, } ss.

Francis Picard, of Rouse's Point, in the county of Clinton, in the State of New York, being duly sworn doth depose and say, that the petition above by him subscribed contains the truth according to the best of his information and belief.

FRAS. PICARD.

Sworn and subscribed before me, this 30th day of July, A. D. 1855.

JOHN BULLIS,  
*Justice of Peace.*

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IN COURT OF CLAIMS.

FRANCIS PICARD, Administrator, &c., Claimant, <i>vs.</i> THE UNITED STATES.	}	Claimant's brief and points.
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I. The claim is founded upon a law of Congress. The consideration was for services in part executed, and to be continued to the end of the war; and the consideration of the contract being complied with by the officer, the obligation to enforce the law now rests with Congress.—(See resolution of Congress, May 15, 1778, Mayo & Moulton's "Pension and Bounty Lands," 3; Resolution of August 24, 1780, *Ib.* 6; Resolution October 21, 1780, *Ib.* 7; Resolution March 22, 1783, § 2, *Ib.* 9; Resolution March 8, 1785, *Ib.* 10; *Ib.* in the introduction, pages xxi, xlii.)

II. The obligation is acknowledged by repeated precedents on the part of Congress.—(See Captain Gibson and Lieutenant Price's case, in October, for the relief of, March 2, 1833; Mayo & Moulton, 180; Lieutenant Wilson's case, act February 27, 1833, his heirs allowed seven years' half pay, with interest, per resolution of Congress, August 24, 1780; *Ib.* 175.)

If there is not an express there is an implied agreement to compensate for confiscated property of claimant, he being an inhabitant of Canada, and joining the American army under the proclamation of Congress, &c.—(See resolution October 3, 1780; Journals of Congress 1774, pages 42 to 45, and 74 to 76.)

James Barrett's case, act March 2, 1833; interest on commutation.

William Price's case, act March 2, 1833; interest on commutation.

Captain George Hulbert's case, act July 2, 1836; interest on commutation.

Dr. James Prescott's case, act July 7, 1838; commutation with interest.

Dr. Axson's case, act June 15, 1832; commutation with interest; *Ib.* 163.

Captain McDuff's case, act April 2, 1830, § 2; land given him the same as to other captains in the continental line; Ib. 148.

Lieutenant Jacob's case, act July 14, 1832; commutation and interest allowed him; Ib. 167.

Colonel Harrison and Thomas Davenport's cases, act July 14, 1832; commutation and interest allowed to heirs; Ib. 168.

Colonel Thornton's case, act February 9, 1833; commutation and interest to administrators, one-fourth to widow, and residue distributed to persons entitled according to the laws of Virginia; Ib. 173.

John Thomas and Peter Foster's cases, act March 2, 1833; commutation and interest as officers; Ib. 178.

Richard Henly Court's case, act March 2, 1833; commutation to his widow, and interest; Ib. 178.

Captain Triplit's case, act March 2, 1833; commutation and interest; Ib. 179.

C. K. AVERILL,  
*Attorney for Claimant.*

IN THE COURT OF CLAIMS, NOS. 22 AND 338.

FRANCIS PICARD, ADMINISTRATOR OF PIERRE AYOTT,

*vs.*

THE UNITED STATES.

*Brief of United States Solicitor.*

I. In petition No. 22 the petitioner claims an amount allowed under resolutions of the continental Congress of February 24 and September 14, 1785.

By the resolution of February 24, 1785, it appears that Ayott was present at the place where Congress held its sessions, and petitioned that body for relief. The resolution allowed him the pay of a captain for a period stated, to be credited in his accounts, and authorized him to draw at once \$300 in advance of settlement, to enable him to return to Canada on business. The resolution of September 14, 1785, passed after reference to the Secretary of War, authorized the above, and a further allowance for expenses to be made in the liquidation of Ayott's accounts by the army commissioner.

The petitioner assumes that no part of the allowance above voted has been paid, and that there was nothing to Ayott's debit on the books of the Treasury to be deducted in the liquidation of his accounts except the \$300 advanced as above. He assumes, also, that no settlement ever was made by the army commissioner under the resolutions. He claims the gross amount voted by the two resolutions, without other deduction than the amount advanced under the first.

1. It is extremely improbable that Ayott suffered the balance of the amount voted him to remain undrawn, being on the spot when

the resolution passed, and having immediately drawn a part of the allowance (see Register's certificate.) The presumption, from the lapse of time, and, still stronger, from the circumstances, is, that he drew all that was due him as soon as the settlement could be made. It is not conceivable that a person who had taken the trouble to prosecute his claim personally before Congress, and had obtained its allowance during his attendance upon that body, and had even received a part, as earnest money, pending the statement of his account, should go off and never apply for the balance. Ayott lived till 1814. If he got no more it was because, on the liquidation of his claims, directed to be made by the resolution, nothing more was found due. Rations were authorized by the same resolutions, and it is not claimed that he did not draw them.

2. But there was a settlement, and he was paid. The Third Auditor's report to this court, and letter to Averill, the petitioner's attorney, shows that two accounts were settled with Ayott. When they were settled he does not state; but the Third Auditor is the successor of the commissioner of army accounts, and no doubt the settlements reported were those made by him on his books; Ayott's account stands closed.

3. The claim is barred by the act of February 12, 1793.—(1 Stat., 301.)

II. He claims in petition No. 22 land under the resolution of September 14, 1785.

1. That resolution only placed him upon the same footing with other Canadian refugees, and in common with them his case was provided for by the act of April 7, 1798.—(1 Stat., 547.)

2. The resolution of April 23, 1783, promised to reward the Canadian refugees by a provision of land, and that promise was carried out by the act above cited. In the fourth section it provides for a board consisting of the Secretary of War, the Secretary of the Treasury, and the Comptroller of the Treasury. They were directed to take into consideration losses and sufferings sustained, and services performed, and to make allowance in land therefor, deducting any allowance already made by individual States. The petitioner's attorney cites the balloting book of New York, showing that Ayott received land from that State, and if he never prosecuted his claim under the act of 1798, and other acts extending it, (cited in foot note thereto, 1 Stat., 547,) it unquestionably was because he had already received as much land from New York as he could have claimed under the act from the United States.

3. All such claims are now barred by limitation under the acts above cited in regard to this subject.

III. In petition No. 338, the petitioner claims the half-pay or commutation due a continental officer under the resolution of October 21, 1780, and March 22, 1783.

There is no evidence that he ever was regularly commissioned in Hazen's or any other regiment. He raised and commanded a company in Canada in 1775-'76—the time for which Congress paid him by resolutions above cited; but the terms of the first resolution imply that he was not commissioned. He was left behind in the retreat of



the American army in 1776, and was probably captured and imprisoned, as Congress made compensation for imprisonment. All the certificates of the military officers speak of his service in Canada in 1775-'76; none of them speak of any service elsewhere; and this almost conclusively negatives his claim of having served after the retreat of the army from Canada; for these certificates were given in 1784. The only evidence offered to prove the alleged service are those of private persons, who could have had no proper opportunity of knowing the exact nature of his connexion with the service. His step-daughter's testimony seems to show that he was a scout, spy, or secret agent. An officer in the continental service could not have gone into Canada and there publicly married a Canadian woman, after bans there published, as Ayott did in 1779.—(See extract from parish register.) It was not till after this that he was forced to fly from Canada.

The evidence utterly fails to show that he remained a captain in continental service till the close of the war. It is not alleged that he was discharged.

IV. He claims indemnification for losses incurred in consequence of his adherence to the cause of the colonies.

On this point I refer to remarks above on his claim (II) for land under the resolution of September, 1785.

V. He claims the bounty land due a continental officer under resolutions of September 16, 1776.

1. The Department of the Interior has authority to adjust such claims under the act of February 8, 1854, (10 Stat., 267,) and the claim should first be presented there.

2. The administrator cannot recover bounty land; it descends as real estate. Opinions of Attorney General Taney, of October 25, 1832, and September 5, 1833.

Much of the evidence offered is inadmissible under the rules of this Court.

JOHN D. McPHERSON,  
*Deputy Solicitor Court of Claims.*

## IN THE COURT OF CLAIMS.

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FRANCIS PICARD, ADM'R OF PIERRE AYOTT, DEC'D,

vs.

THE UNITED STATES.

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SCARBURGH, J., delivered the opinion of the Court.

The petitioner represents that he is interested in his representative character in a claim which his intestate had against the United States for services in the revolutionary war. He states the following case :

Pierre Ayott died intestate in the year 1814. He was commissioned by Congress a captain in the continental service in the revolutionary war, and served as such to the close, or until reduced or retired. The half-pay or commutation provided for in the resolutions of October 21, A. D. 1780, December 31, A. D. 1781, March 22, 1783, and March 8, A. D. 1785, has not been paid, but still remains due.

At the breaking out of the revolution, Pierre Ayott was an inhabitant of Canada and the owner of two lots of land of the value of \$4,000, which were confiscated in consequence of his having taken up arms against Great Britain. He was induced to take up arms in favor of the American cause "by the promises of protection and remuneration by Congress and its agents at the time, and subsequently by resolves of Congress of the 23d of April, 1783, and of the second Congress in the second session promising the same."

The petitioner prays that this court will report a bill to Congress for the payment of his claim, together with interest thereon, unto the heirs or legal representatives of his intestate, or such other bill as may be proper in the premises.

On the 24th day of December, A. D. 1784, Congress, on the report of a committee, to whom was referred a petition of Pierre Ayott, (he is called in the Journal Mr. Ayot,) with sundry papers accompanying the same, stating himself *as having served as captain* in the service of the United States in Canada, and praying a settlement of his accounts and compensation, adopted the following resolution: "That the said petition and prayers be referred to the Paymaster General, to settle the accounts of the petitioner against the United States, and if any difficulty should occur, to report especially."—(4 Journals Cong., 459.)

On the 24th day of February, A. D. 1785, Congress, on the report of a committee, to whom was referred a petition of Pierre Ayott, (he is called in the Journal Captain Pierre Ayot,) with sundry papers accompanying the same, adopted the following resolution: "That the commissioner for settling the accounts of the army be, and he is hereby, directed, in settling the accounts of Captain Pierre Ayot, to admit

to his credit the pay of a captain, during the time of his *serving as such* in the army of the United States, or of his being held in a state of captivity, *any want of form in his commission notwithstanding*; and that the President drew a warrant in his favor, on the Treasurer of the United States, for 300 dollars, to enable him to leave this city and to return to Canada, which sum shall be deducted from the balance which may appear to be due to him on a settlement of his accounts."—(4 Journals of Cong., 474.)

Again: On the 14th day of September, A. D. 1785, Congress, on a report from the Secretary of War, to whom was referred a memorial of Pierre Ayott, adopted the following resolution: "That the commissioner of army accounts, in liquidating the claims of Pierre Ayott, allow him the pay and subsistence of a captain for the year 1776, deducting 300 dollars advanced him by the resolution of the 24th of February last.

"That the further sum of 150 dollars be allowed him in full of all expenses incurred by him in the service of the public.

"That he be allowed rations until the first of June next, and that the same quantity of lands be assigned to him as may be assigned to the heads of other Canadian families."—(4 Journals of Cong., 570.)

Mary Vincelet, who was a step-daughter of Pierre Ayott, testified that she personally knew that he served as a captain in the American army in the revolutionary war, from the time of his intermarriage with her mother, in 1779, till the peace in 1783; that she and her mother followed him in the camp till after the peace; and that, at the close of the war, and after he ceased to draw rations for himself and his family, he was left in a destitute situation, and was obliged to return to the frontier of Canada, where he settled and died in 1814.

There are on file certain papers purporting to be certificates, which, though they do not appear to be duly authenticated, yet are treated as evidence by the deputy solicitor in his brief. They are, in substance, as follows:

(1.) A certificate, signed by Lewis Duboys, Lieut. Col. of 5 N. Yk. regiment, that "Captain Highet commanded a company in Canday in the year 1775 and in the year 1776." (This paper is dated April 24, A. D. 1774.)

(2.) A certificate, dated June 1, A. D. 1784, "that Captain Peter Ayott was one of the oldest captains in late Brigadier General Hazen's regiment, who has suffered much by imprisonment and otherwise in Canada, is now here a refugee from thence, and entitled to draw provisions as a captain under the resolution of Congress of the ninth of August, 1783, from the 1st of May last." Signed "Edward Antill, lieutenant colonel of the second regiment."

(3.) A certificate, dated April 27, A. D. 1784, that "Captain Ayott commanded a company in Canada, and that he was, in March and April, 1776, under my immediate command at Point Levy, and was very active good officer and of great service to the army while in Canada on several occasions, and, to the best of my knowledge, he belonged to Hazen's regiment, which was then raising for the United States." Signed "James Clinton, late brigadier general."

(4.) A certificate "that Pierre Ayott was appointed a captain in the

Canadian regiment commanded by Moses Hazen, esq. ; that he raised a company in a very short time, and was actually employed in keeping up the blockade of Quebec and other very hard service, during which time he and his men were very attentive to their duty, behaved remarkably well upon every occasion, particularly under the command of the then Major Lewis Dubois on the south shore below Quebec in quelling an insurrection, in which he signalized himself for his zeal, conduct, and courage; that a great many of his vouchers and accounts were lost and fell into the enemy's hands with my other baggage on our precipitate retreat from Quebec, at which time he was left behind, being uninformed of our retreat." Signed "Edward Antill, late lieutenant colonel, commanding colonel."

These certificates purport to come from the Secretary of State's office in New York, and to be copied from the books and documents relating to the military service in the war of the revolution. They are, as already stated, not duly authenticated.

The Third Auditor, in a communication to the Secretary of the Treasury, dated June 28, 1856, states "that the accounts current of the officers of the revolution have been destroyed in the burning of the public buildings. The revolutionary books of this office, however, show that he (Pierre Ayott) had an account with the government, which stands settled and closed on the books. He is not returned as having received commutation, nor as having been entitled thereto."

In a letter from W. H. S. Taylor, acting Third Auditor, to C. H. Averill, counsel of the petitioner, dated September 8, A. D. 1856, he says, "that Pierre Ayott appears to have been a captain, but he is not returned on the revolutionary books of this office as having received commutation, nor as having been entitled thereto. He is shown to have had accounts with the government, in the first of which he is charged as follows: To Jonathan Turnbull, \$46; and is credited, By United States, for pay, \$46. In the second account he is credited, By pay of the army, \$454 12; and is charged, To certificates issued, \$454 12. The journal that would contain the entries of the second account has been lost or destroyed."

Mary Vincelet testified that, upon the intermarriage of Pierre Ayott with her mother, he came to the possession of her mother's property, a farm, which is described in the affidavits of other witnesses; and that after the marriage they were driven from it, and it was confiscated by the British government.

The only additional evidence in this case relates to the value of the farm, in relation to which Mary Vincelet testified. The witnesses estimate it as worth \$4,000, sixty years previous to the date of their affidavits in October and November, A. D. 1852.

The evidence in relation to the confiscation of Pierre Ayott's land in Canada is neither satisfactory nor sufficient in law to establish that fact. If it actually occurred, there must be better evidence of it than that which has been adduced; and no excuse for the failure to produce such evidence is offered or suggested. We therefore do not deem it necessary to consider whether, if that fact were established, Pierre Ayott was entitled to indemnity therefor against the United States.

In looking into the evidence in this case, it will be observed that

Pierre Ayott, in his petition to Congress in December, A. D. 1784, merely stated "himself as having *served as captain* in the service of the United States *in Canada*." There is no statement of that date that he ever served *elsewhere*. In the resolution of the 24th of February, A. D. 1785, the commissioner of army accounts was "directed to admit to his credit the pay of a captain, *during the term of his service as such* in the army of the United States, or *of his being in a state of captivity, any want of form in his commission* notwithstanding;" and in the resolution of the 14th September, A. D. 1785, he was directed to "allow him the pay and subsistence of a captain for the year 1776." It will be observed, too, that the certificates, which have been noticed, refer only to services *in Canada*. The only evidence which refers to any other service is the mere *ex parte affidavit* of Mary Vincelet. The evidence shows it to be doubtful whether Pierre Ayott was at any time during the revolution a duly commissioned captain in the American army. It is apparent, that even in 1784 there was some difficulty in relation to the settlement of his accounts, which rendered it necessary for him to apply for the interposition of Congress. Congress acted on his case on three *several* occasions. What the difficulty was, we have not the means of determining. It probably can now be only a matter of mere conjecture.

Under these circumstances, we cannot say that Pierre Ayott was ever entitled to half-pay for life, or to five years' full pay in lieu of such half-pay for life, under the resolutions of Congress, which have been referred to.

We are of the opinion that the petitioner is not entitled to relief.

IN THE SENATE OF THE UNITED STATES.

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DECEMBER 10, 1857.—Received.

DECEMBER 18 1857.—Referred to the Committee on Claims.

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The COURT OF CLAIMS submitted the following

**R E P O R T .**

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

ELLEN MARTIN *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of heirship of claimant transmitted to House of Representatives.
3. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this seventh day of December, A. D. 1857.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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*To the honorable Judges of the Court of Claims of the United States:*

The petition of Ellen Martin, wife of John Levake, of La Colo, in the county of Huntingdon, in Canada East, one of the grandchildren and heirs-at-law of Francis Martin, deceased, begs leave respectfully

to represent unto this honorable Court, that she is interested, as one of the grandchildren of the said Francis Martin, in a claim which the said Francis Martin had against the United States for services in the revolutionary war; that her interest in said claim arises from the consideration that she is one of the grandchildren and heirs-at-law, with others of kin, of the said Francis Martin, who died intestate on or about the ——— day of December, A. D. 1780, and in consideration of certain resolves of Congress hereinafter named.

And your petitioner further represents unto this honorable Court, that the said Francis Martin was commissioned by Congress a lieutenant in the continental service in the revolutionary war, and served as such officer until his death as aforesaid. That by a resolution of Congress of the 24th day of August, 1780, it was provided that the resolution of the 15th of May, 1778, granting half pay for seven years to the officers of the army who should continue in service to the end of the war, be extended to the widows of those officers who have died, or should thereafter die in the service, to commence from the time of such officer's death and continue for the term of seven years; or if there should be no widow, or in case of her death or intermarriage, the said half pay should be given to the orphan children of the officer so dying as aforesaid, if he should have left any, &c. And your petitioner avers that the said Francis Martin died when in the service before the end of the war, and at the time above stated, leaving a wife and children surviving him, but who are now dead, leaving issue.

And your petitioner further shows to this Court, that the seven years' half pay provided for in the foregoing resolution has never been paid, but remains as a debt or claim due to the estate or representatives of the said officer from the United States

And your petitioner further states and avers that she presented her claim to Congress in 1854 for the commutation pay, which was referred to the Senate Committee on Revolutionary Claims, who reported a bill, number of report 82, bill 186, 33d Congress, and recommitted January 5, 1855. All which proceedings she asks to be filed in this Court as a part of the case.

Your petitioner, therefore, prays that this honorable Court will examine into the justice and equity of the said claim, and report a bill to Congress providing for the payment thereof, together with the interest thereon, unto the heirs or legal representatives of the said officer; or such other order or bill as to your honors shall seem fit and proper to report in the premises.

And your petitioner, as in duty bound, will ever pray.

C. K. AVERILL,

*Attorney for Claimant.*

Dated FEBRUARY 25, A. D. 1856.

STATE OF NEW YORK, }  
County of Clinton, } ss.

Calvin K. Averill, of Rouse's Point, in the county of Clinton, in the State of New York, being duly sworn, doth depose and say that

the petition, above by him subscribed, contains the truth, according to the best of his information and belief.

C. K. AVERILL.

Sworn and subscribed before me, this twenty-fifth day of February, A. D. 1856.

M. VAN DERVORT, J. P.

COURT OF CLAIMS, *December 13, 1856.*

Amended petition sworn to before me.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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ELLEN MARTIN vs. THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the Court.

The petitioner, who is now the wife of John Levake, represents that she is one of the grandchildren of Francis Martin, who died intestate in the month of December, 1780; that the said Martin was a lieutenant in the war of the revolution, and served in that capacity until his death; that by a resolution of Congress of August 24, 1780, it was provided that the resolution of May 15, 1778, granting half pay for seven years to the officers of the army who should continue in service to the end of the war, be extended to the widows of those officers who have died, or should thereafter die in the service, to commence from the time of such officer's death and continue for the term of seven years; or, if there should be no widow, or in case of her death or intermarriage, the said half pay should be given to the orphan children of the officer so dying as aforesaid, if he should have left any, &c.

The claimant avers that Martin died in the service before the end of the war, and at the time above stated, leaving a wife and children surviving, but who are now dead, leaving issue. She also alleges that the seven years' half pay has never been paid, but remains due from the United States.

The resolution of May 15, 1778, gives to all officers who should continue in service during the war one-half of their then present pay for the term of seven years after the conclusion of the war. The resolution of August 24, 1780, extends the benefit of the resolution of May 15, 1778, to the widows of those officers who had died, or should thereafter die in the service, the half pay to commence from the time of the officer's death, and to continue for seven years; or if there were no widow, or in case of her death or intermarriage, the half pay should be given to the orphan children of the officer, if he should have left any.

Assuming for the present, for the sake of the argument, that under this last resolution grandchildren may be entitled to the half pay, it is necessary to examine the question whether the claim is barred by the resolutions and statute of limitation.



It is very clear that the claim, even if it were presented by the proper person, is barred. It is not alleged or proved that the claim was ever presented at the treasury prior to the 1st day of May, 1794. We have recently investigated this point at so much length in the cases of *Chamberlain vs. The United States* and *Marnay vs. The United States*, that it is unnecessary now to re-examine it. It is sufficient to say that the decisions in those cases must govern the present, and that the claim, by whomsoever presented, is now barred, and that there is no cause of action arising out of the services of Francis Martin now existing against the United States.

IN THE SENATE OF THE UNITED STATES.

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DECEMBER 19, 1857.—Ordered to be printed.

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Mr. CRITTENDEN submitted for consideration the following

**RESOLUTION.**

*Resolved by the Senate,* That in consideration of the financial condition of the country and its industrial interests, as well as of the wants and embarrassments of the Treasury of the United States, the rates of duty levied under the tariff act of the 3d of March, 1857, ought to be materially increased.

*Resolved, further,* That experience having demonstrated that the present mode of ascertaining the dutiable value of imported goods is productive of monstrous frauds, injurious alike to the government and the honest importer, a system of home valuation ought to be immediately substituted therefor.



IN THE SENATE OF THE UNITED STATES.

JULY 28, 1856.—Referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

H. L. THISTLE *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Claimant's brief.
3. Opinion of the Court refusing an order to take testimony.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this tenth day of July,  
[SEAL.] A. D. 1856.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

UNITED STATES COURT OF CLAIMS.

IN THE MATTER OF THE CLAIM OF HEZEKIAH L. THISTLE *against* THE UNITED STATES GOVERNMENT.

*To the honorable John J. Gilchrist, presiding judge, and the honorable Isaac Blackford and George P. Scarborough, judges of the Court of Claims:*

The petition of Hezekiah L. Thistle respectfully shows to this honorable Court:

*First.* That your petitioner is a citizen of the United States, and now residing in the city, county, and State of New York.

*Second.* That your petitioner was the originator, inventor, and discoverer of certain valuable improvements in the construction of saddle-trees of dragoon and pack saddles, for riding or transmitting heavy burdens on horses or mules; which said improvements were briefly as follows: a peculiar formation and adaptation of the side bars, which, combining the concave and convex formation of the horse's back, and extending down on the arch of the horse's ribs, gave a greater bearing than is usual in the ordinary saddle-tree, and left the vertebrae an

withers free from pressure. Also a peculiar formation and adaptation of the seat of said saddle, which would relieve the pressure upon the muscles of the rider's legs, as existing in the ordinary saddle, and thus preventing the ruptures which they (the ordinary saddles) caused.

Your petitioner shows that he was the originator, discoverer, and inventor of the method and process of conforming and shaping said bars as aforesaid, and of fitting and conforming the foundation of the rider's seat as aforesaid. The entire details, specifications of which were furnished to the Commissioner of Patents, are hereinafter mentioned.

*Third.* Your petitioner further shows, that on or about the fifth day of January, A. D. one thousand eight hundred and forty-seven, he filed in the office of the United States Commissioner of Patents in Washington the requisite petition, affidavit and specifications, drawings and models, according to the statutes in such case made and provided, claiming the issue of letters patent for his said above-mentioned invention, discovery and improvement, and that on the said day he paid the fees and charges required by law to be paid upon filing application for letters patent, and received the treasurer's certificate therefor; whereby the United States government became bound to investigate and pass upon your petitioner's said application for letters patent, according to law, and the regulations of the Patent Office. That said application for letters patent, together with the said petition, affidavit, specifications, drawings and model, were afterwards and before the twenty-sixth day of May, of the said year, to wit, A. D. 1847, with some slight modifications in the said specification, reported to the examining officer of the Patent Office, and that thereupon your petitioner's application for the said letters patent took its place on the files of the Patent Office, to be acted upon in its turn. And your petitioner prays that said petition, affidavit, specifications, drawings, model, &c., be considered as part of this petition, and that he may refer to them as such.

*Fourth.* Your petitioner further shows, that after the said 23d day of May, and before his said application for letters patent had been reached in its turn, to wit, on or about the twelfth day of November, A. D. 1847, one Thornton Grimsley filed in the office of the Commissioner of Patents an application for letters patent, together with the requisite petition, affidavit, specification, drawings and model, claiming in his petition to be the originator, inventor and discoverer of certain valuable improvements in a dragoon and pack saddle; that said Grimsley's said petition, affidavit, specifications, drawings and models, (to which your petitioner hereby prays to refer and make a part of this his petition,) embraced and embodied the greater part of your petitioner's discovery and invention, as set forth in his said application for letters patent; and that said Grimsley's said application for patenting a dragoon and pack saddle covered the same grounds, and embraced the same claims which were set forth in your petitioner's said application; and your petitioner alleges and shows, that the said Grimsley was not the first inventor, originator or discoverer of his said alleged and pretended improvements in a dragoon and pack saddle.

*Fifth.* Your petitioner further shows, that the then Commissioner of Patents did not give your said petitioner notice of the said conflict-

ing claim and application for letters patent, as required by the 8th and 12th sections of the United States Patent Laws passed July 4, 1836, and the acts amendatory thereof.

*Sixth.* Your petitioner further shows, that afterwards and on the 3d day of December, A. D. 1847, and before his said application for letters patent had been reached and acted upon in its turn, that an official letter or note was sent by the Honorable William L. Marcy, the then Secretary of War, to the Honorable Edmund Burke, the then Commissioner of Patents, of which the following is a copy, to wit:

“WASHINGTON, *December 3.*

“SIR: It is represented that the early issue of a patent to Mr. Grimsley for his invention of a dragoon saddle will facilitate a supply for the government. I, therefore, take the liberty to urge that it may be issued to him as soon as practicable.

“Yours, truly,

“WILLIAM L. MARCY.

“Hon. E. BURKE,  
*Commissioner of Patents.*”

Your petitioner further sets forth in the same connexion the said Commissioner's endorsement upon said official letter or note to the “Examiner” in the Patent Office, of which the following is a copy, to wit:

“As the interests of the government will be promoted by an early examination of Mr. Grimsley's application, as appears by the statement of the Secretary of War within, the case may be taken up and acted upon forthwith.

“This note should be filed with the other papers.

“EDMUND BURKE.

“DECEMBER 4, 1847.”

Which said official letter or note and its said endorsement are now on file in the office of the Commissioner of Patents, and your petitioner prays that he may be allowed to refer to them and make them a part of this his petition.

Your petitioner represents and shows that thereupon said Grimsley's said application for letters patent was taken up by the said examiner before its turn, there being at that time many other applications on file in the Patent Office, including your petitioner's aforesaid application, which, according to the statute and the rules of the Patent Office, should have been acted upon before said Grimsley's said application; and that upon his, the said examiner's, report, the Commissioner of Patents caused the said Grimsley's petition to be granted, and on the 11th day of December, A. D. 1847, within thirty days after the filing of said Grimsley's application, the said Commissioner of Patents caused to be issued out of his said office letters patent to the said Grimsley for his said pretended discovery and invention of an improved dragoon and pack saddle; and your petitioner shows that said letters patent were issued contrary to statute and the rules and regulations of the said Patent Office; and that your petitioner's aforesaid application still remains in the Patent Office on file, not acted upon, and postponed.

*Seventh.* Your petitioner, therefore, represents and claims that, by reason of the premises aforesaid, he has been unjustly and illegally deprived of and injured as to his rights and property, by the action of the United States government, through its officers and agents, and that he has been prevented from and deprived of the enjoyment of his said invention and discovery, and that, by reason of the said premises, he has been prevented from enjoying, and deprived of the smallest pecuniary results from his said discovery, origination, and invention. Your petitioner also shows that all his preliminary steps and proceedings in making his said application for letters patent were perfectly formal, correct, and pursuant to the statute in such case made and provided. And your petitioner further shows that his said origination, invention, and discovery, if it had been properly secured to him by letters patent, would have been worth to him at least the sum of one hundred thousand dollars, and therefore claims that, by reason of the said premises, that he has sustained and suffered damage and loss, at the hands of the United States government, in the sum of one hundred thousand dollars.

*Ninth.* Your petitioner shows that during the 30th session of the United States Congress, and during the winter of 1847 and 1848, your petitioner memorialized Congress of and concerning the aforesaid infringements and violation of your petitioner's rights, and that his said memorial and petition was referred to the Committee on Patents, to investigate and report upon the same. The said committee decided that the subject matter of the said petition did not come within the powers and jurisdiction of Congress, and so deciding, refused to investigate and take testimony in the matter, but decided and held that your petitioner's only remedy was an action at law against the then Commissioner of Patents for malpractice. Your petitioner also shows that no subsequent action has been taken by Congress, or your petitioner, upon this his said claim up to the time of filing this his said petition.

Wherefore your petitioner prays the adjudication and order of this your honorable Court in his behalf, and that such relief may be granted and decreed to your petitioner in the premises as shall seem meet to the Court.

Dated November 8, 1855.

GEORGE D. KELLOGG,

*Attorney for Petitioner, 25 Nassau street, New York.*

STATE OF NEW YORK, }  
City and county of New York, } ss.

Hezekiah L. Thistle, the said petitioner, being duly sworn, says: That he has heard read the foregoing petition, and knows the contents thereof, and the same is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true.

H. L. THISTLE.

Sworn to before me, this 13th day of November, 1855.

STRATFORD H. BAILEY,

*Commissioner of Court of Claims for State of New York*

## UNITED STATES COURT OF CLAIMS.

IN THE MATTER OF THE CLAIM OF HEZEKIAH L. THISTLE *vs.* THE UNITED STATES GOVERNMENT.

*Petitioner's Brief.*

The claimant conceives himself to be entitled to present his claim and ask for the favorable decision of this Court, under each and every class of jurisdiction specified in the act of Congress establishing this Court. (see act to establish Court of Claims, passed February 24, 1855, section 1,) on these grounds:

*First point.*—"Congress shall have power, &c., to promote the progress of science and useful arts by securing for limited terms to authors and inventors the exclusive right to their respective writings and discoveries, and to make all laws which shall be necessary and proper for carrying into execution the foregoing powers." \*

Congress has exercised that power by passing laws from time to time entitled "Acts to promote the progress of the useful arts." † Of which laws, the acts of 1836, 1839, and 1842, were in full force at the time of the petitioner's application for letters patent. ‡

*Second point.*—These acts prescribe the duties to be performed by the United States, acting through or by its officers, agents, and the "heads of department," as well as the duties of those applying for letters patent.

The sixth and ninth sections of the patent laws of 1836 specify what should be done by the applicant, which was done in this case. § And the United States, by receiving the fees prescribed by the 9th section of the said patent laws, did impliedly, if not expressly, contract to perform the duties which the government had imposed upon itself, by virtue of the seventh and eighth sections of the said act of 1836. ||

*Third point.*—The government, by its officers of the Patent Office, *did enter* upon its duties in this case as prescribed by the seventh section of said act; ¶ an examination was made, and the application was placed upon the files of the Patent Office to be acted upon in its turn. \*\*

It then became the duty of the Commissioner to issue letters patent therefor; if any objection had been found upon such examination, then it was the duty of the Commissioner, acting for the government, to have notified the applicant, †† so that all things directed to be done on the part of the applicant, or the Commissioner of Patents, might be done; but no such notice was given to the applicant, and therefore his right to such patent was established.

*Fourth point.*—The United States, through its officers and heads of departments, violated the 8th section of the patent laws of 1836, and

\* Constitution of the United States, art. 1, sec. 8.

† Patent Laws from the year 1790 to 1842.

‡ Petition, third clause.

§ Petition, third clause.

|| Curtis on Patents, pp. 637, 638.

¶ Patent Law of 1836, sec. 7.

\*\* Petition, third clause.

†† Patent Laws of 1836, sections 8 and 12.



their contract with the applicant, in not notifying this claimant that Thornton Grimsley's application for letters patent interfered with the then pending application of this petitioner. And the government also violated the whole spirit of the patent laws, the regulations of the Patent Office, and the contract with this petitioner, in issuing letters patent to Grimsley for improvements in a dragoon and pack saddle, of which he was not the first inventor, while the claimant's application was waiting its turn upon the files of the Patent Office for letters patent.

*Fifth point.*—It cannot be necessary to add argument, to establish the principle that the United States are equitably and legally liable for all violations of its laws by its own officers, especially those connected with the executive departments, the same as individuals or corporations.

Prior to the passage of the act establishing this Court, there was no way in which a claim could be enforced against the United States, and therefore parties were compelled to sue the officers of government as individuals, alleging malpractice; or to petition Congress.

This opinion is now exploded. This Court has decided, in the case of Isaac Swain,\* that the government is liable for injury sustained by citizens in consequence of the improper conduct of its agents.

The superior court of the city of New York, after an elaborate argument before its full bench of six judges, decided that the New York and New Haven railroad company were liable in damages for the false and fraudulent certificates of stock given by Robert Schuyler, its transfer agent.†—(The decision is not yet reported, but soon will be in the 3d volume of Duer's reports.) The supreme court of the State of New York has also made a similar decision.‡ The above decisions answer the view that was taken by the committee of Congress when petitioned by the claimant.§

*Sixth point.*—The fact that the Commissioner of Patents violated the law and injured the claimant at the instigation of the head of another department,|| is an additional reason why this claim should be allowed. Admitting that the reason given was the true reason, with all the justification claimed, yet the claimant had a property in his invention which the law recognized, and no private property could be taken constitutionally for public use, either directly or indirectly, without compensating the owner,¶ and the government is both liable and able to make such compensation.

GEO. D. KELLOGG,

*Attorney for Petitioner, 25 Nassau street, N. Y.*

A. THOMPSON,

*Of counsel.*

\* Decision of United States Court of Claims made in the case of Isaac Swain, on or about October 29, 1855.

† Decided on or about June 23, 1855.

‡ 1 Abbot's Practice Reports, (N. Y.,) 417.

§ Petition, *ninth* clause.

|| Petition, *sixth* clause.

¶ Constitution of the U. S., art. 5; and 2d vol. Kent's Com., pp. 392 to 397, and cases there cited.

HEZEKIAH L. THISTLE *vs.* THE UNITED STATES.

The opinion of the Court was delivered by SCARBURGH, J.

The petitioner alleges that he was "the originator, inventor, and discoverer of certain valuable improvements," specified in his petition, "in the construction of saddle-trees of dragoon and pack-saddles, for riding or transmitting heavy burdens on horses and mules."

On or about the 5th day of January, A. D. 1847, he filed in the office of the Commissioner of Patents "the requisite petition, affidavit, and specifications, drawings, and models, according to the statutes in such case made and provided, claiming the issue of letters patent for his said above mentioned invention, discovery, and improvement," and then paid the fees and charges required by law, and received the treasurer's certificate therefor.

The application for letters patent, together with the petition, affidavit, specifications, drawings and model were afterwards, and before the 26th day of May, A. D. 1847, with some slight modifications in the specifications, reported to the examining officer of the Patent Office, and thereupon the petitioner's application for letters patent took its place on the files of the Patent Office, to be acted upon in its turn.

On or about the 12th day of November, A. D. 1847, before the petitioner's application for letters patent had been reached in its turn, Thornton Grimsley filed in the office of the Commissioner of Patents an application for letters patent, together with the requisite petition, affidavit, specifications, drawings, and model, claiming in his petition to be the originator, inventor, and discoverer of certain valuable improvements in a dragoon and pack-saddle. Grimsley's petition, affidavit, specifications, drawings and models embraced and embodied the greater part of the petitioner's discovery and invention, as set forth in his application for letters patent; and Grimsley's application for patenting a dragoon and pack-saddle covered the same grounds and embraced the same claims which were set forth in the petitioner's application, but Grimsley was not the first inventor, originator or discover of his alleged and pretended improvements in a dragoon and pack-saddle.

The "then Commissioner of Patents did not give" the "petitioner notice of the said conflicting claim and application for letters patent, as required by the eighth and twelfth sections of the United States patent laws passed July 4th, 1836, and the act amendatory thereof."

On the 3d day of December, A. D. 1847, before the petitioner's application for letters patent had been reached and acted upon in its turn, "an official letter or note was sent by the Hon. William L. Marcy, the then Secretary of War, to the Hon. Edmund Burke, the then Commissioner of Patents, of which the following is a copy, to wit:

"WASHINGTON, December 3.

"SIR: It is represented that the early issue of a patent to Mr. Grimsley, for his invention of a dragoon saddle, will facilitate a sup-

ply for the government. I therefore take the liberty to urge that it may be issued to him as soon as practicable.

"Yours, truly,

"W. L. MARCY.

"Hon. E. BURKE,

"*Commissioner of Patents.*"

The Commissioner made the following "endorsement upon said official letter or note to the 'examiner' in the Patent Office :

"As the interests of the government will be promoted by an early examination of Mr. Grimsley's application, as appears by the statement of the Secretary of War within, the case may be taken up and acted upon forthwith.

"This note should be filed with the other papers.

"EDMUND BURKE.

"DECEMBER 14, 1847."

Thereupon Grimsley's application for letters patent was taken up by the examiner before its turn, and upon his report the Commissioner of Patents caused Grimley's petition to be granted, and on the 11th day of December, A. D. 1847, within thirty days after filing his petition, the Commissioner of Patents caused to be issued out of his office letters patent to Grimsley for his pretended discovery and invention of an improved dragoon and pack-saddle. The "said letters were issued contrary to statute and regulations of the said Patent Office," and the petitioner's application still remains in the Patent Office, on file, not acted upon, and postponed.

The petitioner, during the winter of 1847-'48, memorialized Congress, and the Committee on Patents made a report unfavorable to his claim. He now insists that his "said origination, invention, and discovery, if it had been properly secured to him by letters patent, would have been worth to him at least the sum of one hundred thousand dollars," and he claims this sum against the United States. Such is the petitioner's case, as it is stated in his petition. If any wrong has been done him, it was committed by the United States, or any officer of theirs, under such circumstances as render them pecuniarily responsible to the petitioner. Taking, as we must at this stage of the case, the allegations of the petitioner to be true, the most that he has shown is, that he has been injured by the misconduct in office of the Commissioner of Patents. But the United States are not ordinarily responsible for either the malfeasance or nonfeasance in office of a public officer; and it does not seem to us that this case constitutes an exception to the general rule. We are, therefore, of the opinion that the petitioner is not entitled to relief. No order will be made directing testimony to be taken in this case.

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IN THE SENATE OF THE UNITED STATES.

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APRIL 2, 1856.—Referred to the Committee on Claims.

APRIL 17, 1856.—Committee discharged and referred to the Committee on Patents and the Patent Office.

DECEMBER 18, 1857.—Referred to the Committee on Claims.

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The COURT OF CLAIMS submitted the following

**R E P O R T .**

*To the honorable the Senate and House of Representatives of the United States in Congress assembled :*

The Court of Claims respectfully present the following report in the case of

CYRUS H. McCORMICK *vs.* THE UNITED STATES.

1. The petition of the claimant, filed in Court November 10, 1855.
2. The opinion of the Court, delivered on the 16th day of March, 1856, in the case, submitted without brief or argument.
3. Memorial to Congress and accompanying documents, referred to the Court of Claims by the House of Representatives, March 3, 1856, constituting all the evidence in the case. These documents are attached to the report presented to the House of Representatives.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this first day of April, A.  
[L. s.] D. 1856.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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*To the honorable the Judges of the Court of Claims:*

The petition of Cyrus H. McCormick respectfully represents: That heretofore, on the 21st day of June, eighteen hundred and thirty-four, he obtained a patent from the United States for a certain new and useful improvement in reaping machines, giving him an exclusive right therein for the period of fourteen years. That nearly the entire of this period was occupied in the endeavor to bring his invention into general use, and was attended by loss of time and heavy pecuniary

expense. That his receipts from the sale of the same were comparatively small and altogether insufficient to give him the advantage the patent contemplated. That he afterwards, and before the expiration of the said fourteen years, to wit, on the 19th of January, 1848, and under the authority of the eighteenth section of the act of Congress of the 4th July, 1836, applied for an extension of the patent; but the same was refused, because of an alleged informality in the taking of his evidence, as will appear by a letter from the Hon. Edmund Burke, then the Commissioner of Patents, a copy of which is herewith filed, marked A, and prayed to be considered as a part of this petition. That afterwards, at the session of Congress of 1853, he memorialized that body for a renewal of the patent; and, as his memorial was subsequently modified, for a law authorizing the Patent Office to rehear the case, as will appear by a copy of his memorial and the bill reported by a committee of the House of Representatives at the session of 1855, marked B and C, and prayed to be considered as a part of this petition. That the memorial and the bill were before and pending in said House at the last session thereof, and were, with all the matters appertaining to the same, by order of said House, referred to this honorable Court, by means whereof this Court became invested with jurisdiction over the same, and authorized to decide whether, under all the circumstances attending the said application to Congress, he should be entitled to a rehearing of the claim for such extension of his patent. Your petitioner also herewith exhibits a copy of his said patent of 1834, and of his petition to the office for an extension thereof, hereinbefore referred to, marked D and E, and prayed to be considered as a part of his petition; and prays for such relief as he may seem entitled to.

REVERDY JOHNSON, *for Petitioner.*

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A.

“GENTLEMEN: Your letter of March 1st instant has been duly received; and in reply to the inquiries which it contains, I have the honor to state the grounds on which the board for the extension of patents under the 18th section of the act of July 4, 1836, reorganizing the Patent Office, declared to extend the patents of Obed Hussey and Cyrus H. McCormick, for reaping machines; they are as follows:

“1st. In relation to the patent of Hussey, if my memory serves me, his patent expired some time within the latter part of December, 1847. During that month, and within some ten or twelve days before the expiration of his patent, he applied to me, as Commissioner of Patents, for an extension. I informed him that inasmuch as the act of Congress prescribed the mode in which patents should be extended; required a reasonable notice to be given to the public in sundry newspapers, published in those parts of the country most interested against such extension; and as the board had decided that ‘reasonable’ notice should be a publication of the application for extension three weeks prior to the day appointed for the hearing, there was not time to give

the required notice in his case ; and I advised Mr. Hussey not to make his application, and thus lose the fee of \$40 required in such cases—as he inevitably would, without the least prospect of succeeding in his application—but to petition Congress for an extension, which body had the power to grant it. This is all which I, as Commissioner of Patents, had to do with Mr. Hussey's application.

"2d. As to the case of Mr. McCormick, during the same winter, (of 1847-'48,) and after Mr. Hussey had applied to me for the extension of his patent, Mr. McCormick made application in due form, and in season, for the extension of his patent, which was granted in June, 1834, and consequently expired in June, 1848. Due notice was given ; and on the day appointed for a hearing Mr. Hussey appeared to contest the extension of McCormick's patent. And on examination of the records of the Patent Office, and a comparison of the two patents, it appeared they both covered one or more features substantially identical in principle, but not the same precise combinations. And inasmuch as Mr. Hussey's patent bore date before McCormick's, the board decided that he was *prima facie* the inventor of the feature, or rather claim, which conflicted. But Mr. McCormick contended that he invented the part of the machine embraced in both patents one or two years before Hussey obtained his patent, and was, in fact, the first and original inventor ; and he prayed for a continuance of the hearing until he could take testimony upon that point to sustain his right.

"His request was granted, and he was ordered to take testimony, with due notice to Mr. Hussey.

"He complied with the orders of the board ; but on an examination of the testimony on the next day of hearing it was found to have been informally taken, and therefore ruled out.

"Mr. McCormick subsequently made efforts to supply the defects, but never did satisfactorily to the board, and they declined extending his patent. Such is a brief history of the proceedings before the board of extension on McCormick's application.

"I will now give my views with regard to the merits of the invention itself. I do not hesitate to say that it is one of very great merit. In agriculture it is in my view as important, as a labor-saving device, as the spinning-jenny and power loom in manufactures. It is one of those great and valuable inventions which commence a new era in the progress of improvement, and whose beneficial influence is felt in all coming time ; and I do not hesitate to say that the man whose genius produces a machine of so much value should make a large fortune out of it. It is not possible for him to obtain, during the whole existence of the term of his patent, a tenth part of the value of the labor saved to the community by it in a single year. Therefore I was in favor of its extension.

"There were, however, other reasons which induced me to favor its extension. One was the fact that the machine was one which could be used only a few weeks in each year. Therefore, for want of an opportunity to test it, its perfection must be a work of time and tediousness. It is not like the steam-engine and other machines in common use, upon which improvements may be at any time tested. Therefore the invention and perfection of a reaping machine must

be a work of slow progress. And such was the case with McCormick's machine. He was many years experimenting upon it before he succeeded in making a machine that would operate, as the testimony before the board (although informal) clearly proved. In the next place, it is a machine which was difficult to introduce into public use. It was imperfect in its operation at first. It had to encounter the prejudices and the doubts and fears of agriculturists. And it appeared in proof, that Mr. McCormick was not able to sell but very few machines until two or three years before the expiration of his first patent which covered the leading original principles of his invention. Under that patent he never received anything like an adequate compensation for the really great invention which he had produced. And I now repeat, what I have always said, that his patent should be extended. With regard to the conflicts of rights and interest between him and Mr. Hussey, it is proper for me to remark, that when both these patents were granted the Patent Office made no examination upon the points of originality and priority of invention, but granted all patents applied for as a matter of course. Therefore, it is no certain evidence that because an alleged inventor procured a patent before his rival he was the first and original inventor. It, in fact, was a circumstance of very little weight in its bearing upon the question of priority between the parties. Besides, the testimony of Mr. McCormick, presented to the board of extension, clearly proved that he invented and put in operation his machine in 1831, two years before the date of Hussey's patent.

"But my opinion is that justice will be best subserved by extending the patents of both parties. Their claims are not in all respects identical, but both include features and combinations which would entitle either of them to a patent, if he were to strike out of his patent all that the other claimed. Besides, if these patents were extended, they could then settle their respective rights in a court of law, if they should so elect.

"I again repeat that, in my judgment, McCormick's patent should be extended. That was my opinion when the matter was before the board of extension, and it has never changed.

"McCormick has two other patents for improvements upon his machine, the last of which expires in 1861. They all relate to the same machine, and there would be great propriety in extending his first and second patents to the date of the expiration of his third and last one. This would, in fact, consolidate the invention, and secure his just rights. Mr. Hussey's patent could be extended to the same date, and thus the rights of both would be secured. They are both meritorious inventors, and have produced machines of great value, but for which they have not been able to secure an adequate remuneration, because their machines are adapted to use only for a very small portion of the season.

"I have the honor to be, respectfully, your obedient servant,

"EDMUND BURKE.

"Hon. STEPHEN A. DOUGLAS,

"Hon. JAMES SHIELDS,

"*United States Senate.*"

## B.

*To the Senate and the House of Representatives of the United States in Congress assembled :*

The petition of the undersigned, Cyrus H. McCormick, of Chicago, in the State of Illinois, respectfully represents:

That he is the first and original inventor of a certain new and useful improvement in reaping machines, of very great value and importance to the country, for which letters patent of the United States, dated on the twenty-first day of June, eighteen hundred and thirty-four, were issued, granting to your petitioner the exclusive right to use the same for the term of fourteen years from that day; that during the whole term for which said letters patent were originally granted, your petitioner was occupied by the effort to bring his said invention into general use, at a very heavy expense of money and loss of time, and that during all that time the receipts were insufficient to pay the expenses and compensate him for his time employed in that business; whereby he never received any compensation for the ingenuity or value of his invention.

Your petitioner therefore prays that, upon the proof of these facts, your honorable bodies will enact a law extending his said patent for the term of fourteen years, from the twenty-first day of June, eighteen hundred and forty-eight, at which time the original patent expired, saving to all persons all rights which they may have acquired since the date of the expiration of said patent.

C. H. McCORMICK.

WASHINGTON, December 18, 1853.

*Action of Congress.*

December 20, 1853, referred to Committee on Patents.

February 23, 1855, Bill No. 782.

March 3, 1855, referred to Court of Claims.

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CYRUS H. McCORMICK *vs.* THE UNITED STATES.

Opinion of the Court delivered by Chief Justice GILCHRIST :

The Court are of opinion that the claim is not founded upon any law of Congress, or any regulation of an executive department, or any contract expressed or implied, with the United States, or upon any legal right. It is simply a petition to Congress to pass a law, which it is in the discretion of Congress to enact or not, as they shall deem best. The Court have no authority to regulate the discretion of Congress, or to recommend any legislation. There is in no sense any claim upon the United States, except such as may be addressed to their views of what is on the whole proper; consequently the Court have no jurisdiction to order testimony to be taken.





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## MEMORIAL

OF

## THE LEGISLATURE OF MISSOURI,

IN REGARD

*To Wolf island, the jurisdiction of which is in dispute between that State and Kentucky, praying that the land may be sold, so that the purchasers may test the question of jurisdiction in the federal courts.*

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DECEMBER 22, 1857.—Ordered to lie on the table and be printed.

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*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

Your memorialists, the general assembly of the State of Missouri, respectfully represent: That an island, lying in the Mississippi river, below the mouth of the Ohio river, called Wolf island, is claimed by this State and the State of Kentucky. This State claims that the true boundary between her and Kentucky is the middle of the main channel of the river, running south of said island, and Kentucky claims the channel of the river flowing north of said island as the true boundary. Your memorialists are informed that this island contains between five and six thousand acres of land which is very rich and valuable. The island was surveyed many years since by the authority of the United States, and that the sale of said land has been suspended on account of the representations of interested persons that the island was within the limits of Kentucky's boundary. Your memorialists are advised that the claim of Kentucky to said island is without any just grounds, and that, in truth, said island is clearly within the boundary of this State. That the conflict of jurisdiction between this State and Kentucky is inconvenient and oppressive to the inhabitants of said island, and vexatious and inconvenient to the legal authorities of the two States; hence it is very desirable that the true boundary between the two States should be ascertained and made known in some authentic and binding manner, and your memorialists think this question of boundary can be best settled by an adjudication upon that subject in the federal courts; and if the lands on said island were sold, the purchasers would properly test the question of boundary before the proper tribunal,

and thereby settle this question. In consideration of the premises, your memorialists respectfully solicit your honorable body to enact a law compelling the proper authorities to offer the land on said island for sale, and keep them in market until they are all sold.

R. C. HARRISON,

*Speaker of the House of Representatives.*

H. JACKSON,

*President of the Senate.*

Approved January 30, 1857.

TRUSTEN POLK.

I, B. F. Massey, secretary of state, hereby certify the foregoing to be a full and correct copy of the original roll now on file in this office. Done at the office of secretary of state, in the city of Jefferson, this 28th day of September, A. D. 1857.

[L. s.]

B. F. MASSEY,

*Secretary of State.*

## RESOLUTION

OF THE

## LEGISLATURE OF MICHIGAN,

IN FAVOR OF

*The division of the State into two judicial districts.*

DECEMBER 22, 1857.—Referred to the Committee on the Judiciary and ordered to be printed.

JOINT RESOLUTION respecting the United States circuit and district courts for this State.

Whereas our citizens in portions of this State remote from Detroit now, and for some time past, have found it inconvenient, expensive, and otherwise onerous to visit Detroit, where the United States courts for the district of Michigan are alone holden, for the transaction of business in said courts;

And whereas our State is fast settling in the north and north-western portions thereof, requiring, in justice to our citizens, a division of the State into two districts, making an east and a west district, in which districts Detroit should be the place of holding the courts for the eastern district, and Grand Rapids for the western districts; therefore,

*Resolved*, That we believe it to be the duty of the Congress of the United States to divide our State into two districts, respectively embracing such territory as will best promote the interest of our citizens, and that Detroit should be made the term place of the eastern, and Grand Rapids of the western district.

*Resolved*, That our senators in Congress be, and they are hereby, instructed, and our representatives requested, to use their influence and vote for the passage of an act of Congress that shall accomplish the object recited in the foregoing preamble and resolution.

*Resolved*, That the governor be requested to forward copies of the foregoing preamble and resolutions to our senators and representatives in Congress.

GEO. A. COE,

*President of the Senate.*

B. G. STOUT,

*Speaker of the House of Representatives.*

Approved February 17, 1857.

K. S. BINGHAM.

STATE OF MICHIGAN,        }  
*Office of Secretary of State,* } ss.

I hereby certify that I have compared the foregoing copy of a joint resolution of the legislature of the State of Michigan with the original now on file in this office, and that it is a correct transcript therefrom, and of the whole of such original.

In witness whereof I have hereunto set my hand and affixed the  
[L. s.] great seal of the State of Michigan, at Lansing, this seven-  
teenth day of December, A. D. 1857.

E. A. THOMPSON,  
*Deputy Secretary of State.*

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 21, 1857.—Referred to the Committee of Claims.  
DECEMBER 18, 1857.—Referred to the Committee of Claims, and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

DAVID MYERLE *vs.* THE UNITED STATES.

1. The petition of the claimant and the opinion of the Court thereon.
2. Contracts between claimant and board of navy commissioners to supply water-rotted hemp, transmitted to the House of Representatives.
3. Correspondence relating thereto and other letters connected with the claim, transmitted to the House of Representatives.
4. Printed depositions offered by the claimant and the government in the case, the originals transmitted to the House of Representatives.
5. First official report on American water-rotted hemp.
6. United States Solicitor's brief.
7. Opinion of the Court.

By order of the Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the  
[L. s.] seal of said court at Washington, this twenty-first day of February, A. D. 1857.

SAML. H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

*Opinion of the Court in the case of David Myerle, ordering testimony to be taken, delivered by Judge Gilchrist, October 20, 1855.*

As the Court of Claims has only a peculiar jurisdiction, its power to investigate and report upon a claim of this description depends upon the construction of the act of Congress establishing the court and defining its duties.



The first section of the act of Congress of the 24th of February, 1855, after specifying four classes of claims which shall be heard and determined by the court, adds to this specific enumeration the following clause:

“And also all claims which may be referred to said court by either house of Congress.”

There are thus, then, five classes of claims which the court “shall hear and determine;” the fifth class is as distinctly within the jurisdiction of the court as those which are specified before it. The only difference between them is that it does not describe the nature of the claims. The act leaves to either House of Congress, without the co-operation of the other, the power to refer to the court any claim that may be presented to it, whether the claim be or be not “founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States.”

One reason for establishing this tribunal was, that the public business should not be impeded by imposing upon the committees of Congress the laborious duty of investigating cases, often intricate in their character, and requiring a careful analysis of testimony; and this might be necessary whether the particular claim was or was not included in the first four classes, or any of them. There is then as obvious a reason for the fifth clause as for the preceding ones, for if the first were to relieve Congress from the investigation of claims, the act would but imperfectly accomplish its purpose if it did not contain this provision.

As the claim of David Myerle has been referred to us by a resolution of one of the Houses of Congress, it is unnecessary, for the purpose of settling the question of jurisdiction, to investigate and determine the question, whether there was a contract with the government, and if so, how far it was valid, and what were its provisions and limitations. How far the Secretary of the Navy had the power to bind the United States, and whether he was authorized to make such a contract as that stated in the petition, are questions of law; but before they are determined, it appears to the court expedient that the evidence should be had before them.

An inquiry into the general power of the Secretary at that time to make contracts binding upon the United States would open a wide, and in the present stage of the case, unnecessary field for discussion.

An inquiry into his powers, if it should be necessary, will be narrowed and rendered much more intelligible after the evidence is submitted. It is also premature to remark upon the subject of damages, as that is a question of fact, and their amount and extent, if we should reach that inquiry, will depend upon the testimony.

We cannot say that the facts set forth in the petition do not furnish any ground for relief. The claim of the petitioner must depend upon the contract shown by the proof, and the power of the Secretary to make it. We shall, therefore, authorize testimony to be taken in the case. We do not, of course, mean to express any opinion upon the merits of the claim.

*To the honorable the Judges of the Court of Claims :*

The petition of David Myerle respectfully sheweth that, in the year 1840, and long before, your petitioner had been largely engaged in the manufacture of cordage, and had acquired much knowledge on the subject of the growth, preparation, and manufacture of hemp.

That it had been long considered a matter of the highest national importance, and especially essential to that independence of other nations, in time of war, which such a country as ours ought to achieve, that the practicability and safety of the process of water-rotting hemp, in the hemp growing regions of our country, should be established, and the navy and commercial marine of the United States be supplied with an article now almost universally found upon the list as contraband of war, without the risk of those contingencies which would result from entire dependence upon foreign countries for its supply. That, previous to the period named, the government, in view of the great national importance of the object to be gained, had invited and encouraged individual enterprise to accomplish this end ; but, that not only had all such efforts proved unavailing, but had left an abiding impression that the process of water rotting was impracticable in the climate of the hemp growing portions of the United States from its unhealthiness, and that its consequences, if largely entered into, would be pestilence and great destruction of life ; and so deeply rooted were these prejudices, that scarcely a ton of water-rotted hemp was made in the whole United States.

That, in the year 1839, (your petitioner having been called by business to the Navy Department at Washington,) the honorable James K. Paulding, who was then Secretary of the Navy, brought the subject of water-rotting hemp to the attention of your petitioner, remarking that its accomplishment was a matter of great national concern, and the prejudices which were entertained as to its unhealthiness and impracticability ; upon which your petitioner expressed his belief of the groundlessness of those prejudices, and that, by a proper person and by a proper course, they could be done away. That, thereupon, the Secretary urged upon your petitioner the undertaking, and held out to him distinctly the promise of liberal patronage by the government. That your petitioner represented to the Secretary that the undertaking would be attended with great sacrifices to him, and would in particular lead to an abandonment almost entirely of the business in which he was then engaged, inasmuch as the prosecution of the proposed plan would raise the price of hemp, and thereby cause great sacrifices in the cordage factories which he then was carrying on. That, nevertheless, the said Secretary still urged it as a matter of national importance, and promised to your petitioner indemnity against loss, and, if successful, the most liberal rewards of the government. And your petitioner further shows that the navy commissioners, and also the chairman and several members of the Naval Committee of the House of Representatives, warmly concurred in the same. That your petitioner sought no contract, nor did he introduce the subject, but that the proposal came from the Secretary of the Navy, and, as your petitioner most fervently believes, was prompted, not from the

mere want of a certain quantity of hemp, but from the great and laudable desire of inducing experiments which should result in the supply of the American navy with American water-rotted hemp. In this spirit your petitioner accepted the proposal, at the understood risk of sacrificing the business in which he was then engaged, and upon the express inducement and promise of indemnity on the part of the government. So far was your petitioner from seeking such employment, that he had, in the year 1837, declined a similar proposal made by the board of navy commissioners, composed of Commodores Rogers and Chauncey, and urged upon him by the honorable Levi Woodbury, at the time Secretary of the Treasury.

And your petitioner further shows, that the Secretary of the Navy, intending to bring the matter before Congress for the purpose of invoking its aid in carrying out the objects of the department, (which was responded to by the Senate, but, from want of time, was not acted on in the House of Representatives,) and until enlarged powers should, for this specific purpose, be conferred on the department, directed a contract to be entered into with your petitioner for the delivery of 200 tons of American water-rotted hemp, to be equal to the best Russian, during the year 1841; and before its delivery, or any part thereof, and with a perfect understanding of the difficulties and uncertainties as to a literal compliance with the terms of said contract by the first experiment, said Secretary afterwards caused said contract to be extended to 500 tons, to be delivered by the close of the year 1842.

And your memorialist avers that it was not the leading object of said contract to procure the before mentioned quantity of American water-rotted hemp, or to obtain, in that particular instance, a domestic article, if equal in quality to the Russian; but, on the contrary, the great leading and ultimate object of the department was, and it was so expressed and understood at the time both by your memorialist and said Secretary, to establish the practicability and safety of the water-rotting process in our own country, and thus provide for it an independent domestic supply for our navy and merchant marine, particularly in time of war, with an article indispensable to their very existence.

And your petitioner further shows, as evidence of the peculiarity of this contract, that no security was taken or required of him for the performance of its provisions, (it being well understood to be an experiment undertaken at the instance and for the benefit of the government,) but that it was also expressly avowed by said Secretary, and also well understood by your petitioner, that the hemp culled for in said contract should not be rejected (as in case of a mere contract for supply) if the article, upon inspection, should not turn out to be equal to the requirements of the contract, provided it gave evidence of faithful exertions on the part of your petitioner to render the experiment successful.

And your memorialist further shows, that in the fall of 1840 he made two shipments of hemp for the government to Boston for inspection at the Charlestown navy yard, whilst at the same time he was preparing other shipments. That the two first mentioned shipments after their arrival, (which was after Mr. Secretary Paulding's

term of office had expired,) were examined with the most rigid scrutiny, condemned, and rejected, unjustly and without cause, (had it been an ordinary contract for the supply of hemp,) but most injuriously to your petitioner when regarded with reference to the objects, assurances, and interests of the government, as expressed by the Secretary of the Navy, Mr. Paulding. That, in fact, the first portions were rejected for want of cleanliness, whilst, in strength, they were some forty per cent. above the government test, and that the remainder was clean, free from tow, and of strong fibre and superior to the first quality of Russian hemp. But that, at any rate, it ought not to have been rejected under the circumstances, inasmuch as the experiment had demonstrated that which the patriotic motives of the Secretary had principally in view, to wit, the practicability of producing American water-rotted hemp of as much strength as the best Russian, whilst the mere accident of want of cleanliness could be soon got rid of by further experiments, as was shown by the subsequent shipments.

And your petitioner shows, that by the improper rejection of his hemp, and by the failure of the government to carry out the understanding upon which your petitioner was induced to abandon a thriving business, in order to insure the success of the project, by the loss thereby of all advantage from the extension of his contract, by the destruction of his credit, which had been greatly extended by engagements connected with this enterprise, by the sacrifice of his property, by seizures and forced sales for debts which ought to have been met by means furnished by the government itself in the fulfilment of its obligations, by the loss of his services and labor for five of the best years of his life, whereby this government is now in the full fruition of the object for which these sacrifices were made, whilst your petitioner is left in his old age the victim of an enterprise by which his country is profiting; your petitioner avers that he has a just and valid claim upon the government for damages to the amount of from \$150,000 to \$200,000.

And your petitioner further shows that his claim has been before Congress for about eleven years, and that he is the sole owner thereof. That soon after his first application there was an adverse report thereon in the Senate, entirely from misapprehension. Subsequently, there have been eleven favorable reports, and not a single other unfavorable report. The claim has passed the House of Representatives three times, and on each occasion has been favorably reported on, and without amendment, in the Senate, with a recommendation of its passage; but from want of time, such House bill has not been acted on in that body. It has also passed the Senate three times, but not both Houses of any one Congress, so as to become a law. It was once laid on the table. The bills reported by all the committees were rather intended to give immediate relief, and establish the *right* of your petitioner, than finally to decide upon the *amount* to which he was entitled, as the reports and debates indicate.

And your petitioner prays that justice may be done him in your honorable court, and will ever pray, &c.

DAVID MYERLE.

A. H. LAWRENCE,  
*Counsel for Petitioner.*

DISTRICT OF COLUMBIA, *Washington county, to wit:*

On this 8th day of June, A. D. 1855, before me, David Saunders, a justice of the peace in and for said county, personally appeared David Myerle, the above named petitioner, and made oath that the facts stated in the foregoing petition are true to the best of his knowledge and belief.

D. SAUNDERS, *J. P.*

DEPOSITIONS IN THE CASE OF DAVID MYERLE, BEFORE THE COURT OF CLAIMS.

*Interrogatories propounded to James K. Paulding and Jacob Hall, with the answers thereto, in the case of David Myerle.*

INTERROGATORIES AND ANSWERS BY JAMES K. PAULDING.

Interrogatory 1st. To the general interrogatory, what is your name, age, and occupation, and where has been your place of residence for the past year, and have you any interest, direct or indirect, in the claim which is the subject of inquiry, and are you in any degree related to the claimant?—the witness answering, says:

That his name is James Kirk Paulding; that he is now in the seventy-seventh year of his age, and that he is a farmer; that he resides at Hyde Park, Dutchess county, State of New York; and that he has no interest, direct or indirect, in the claim of David Myerle, except what arises from a conviction of its justice; and that he is in no way related to David Myerle.

Interrogatory 2d. State what your personal knowledge is in regard to the claim of David Myerle, relative to his experiments for the production of American water-rotted hemp, and also in relation to his contract with the government for the supply of water-rotted hemp for the navy.

Witness answers and says to this interrogatory, that he presided over the Navy Department of the United States a greater portion of the administration of President Van Buren; and that while occupying that station, his mind had been frequently drawn to a consideration of the practicability of procuring a supply of American water-rotted hemp, adequate to the wants of the United States navy, and thus rendering it independent of foreign nations for that indispensable article; that it is within his official knowledge that attempts have been made by more than one of his predecessors, as well as by Congress, for the attainment of that object, but have invariably failed, owing, in a great measure, if not entirely, to an impression universally prevailing in the hemp growing districts, that the preparation of water-rotted hemp was an employment more or less fatal to themselves, their horses, and the cattle engaged in that operation; that while at the head of the Navy Department Mr. Myerle, then an entire stranger to this deponent, called on him with reference to certain improvements he had made in the machinery for manufacturing cordage, which he was desirous of in-

roducing into the navy; that this deponent perceiving in the course of conversation that Mr. Myerle was an ardent, intelligent, and enterprising man, well acquainted with the manufacturing of hemp, took occasion to introduce the subject of water-rotting, and to suggest that it might be made advantageous to him to engage in that business; that Mr. Myerle, in reply, stated in substance, that though he felt assured the general belief which prevailed throughout the hemp districts, that it was an occupation dangerous to all those engaged in it, was without foundation, yet, being at that time engaged in a profitable business, he was not willing to relinquish it for one which he foresaw would be attended with almost insurmountable obstacles, and a failure of which would involve him in great pecuniary loss.

This deponent further saith, that in order to obviate this objection, he assured Mr. Myerle that the department would take care he should be recompensed for any loss he might ultimately sustain in consequence of a failure of the experiment; and this deponent avers that he was induced to make this promise solely in the hope of being instrumental in conferring a great benefit on his country, and under a full conviction that if he remained in office he would redeem his pledge, without transcending his powers or violating any existing law. Influenced, as this deponent fully believes, by these assurances, as well as by motives of patriotism, Mr. Myerle finally acceded to his proposition, and a contract was accordingly entered into with him for two hundred tons of American water-rotted hemp, on terms which it was presumed would afford him a liberal profit, and sufficient time to make deliveries. Mr. Myerle made no application for a contract; the proposal came from this deponent; nor were any advertisements for proposals issued, as all previous attempts for procuring water-rotted hemp had proved abortive; nor was any security demanded for the fulfilment of his contract, as the whole affair was considered an experiment, made with a view to settle a question of great national importance.

And this deponent further saith, that his object in thus departing from the usual mode of making contracts was not merely to procure a temporary supply of two hundred tons of American water-rotted hemp, but to remove, if possible, that prevailing impression or prejudice against the process of water-rotting which was the great obstacle to its production, and at the same time demonstrate the practicability of preparing a domestic article which would successfully compete with the first quality of Russian hemp.

This deponent further saith, that in order to afford Mr. Myerle every reasonable facility in prosecuting his undertaking, he subsequently requested the Hon. James Buchanan, then a member of the Senate of the United States, to offer a resolution to enable the Secretary of the Navy to make advances to Mr. Myerle, from time to time, to the amount of 25,000 dollars, on certain conditions; which resolution passed the Senate, but was not taken up by the House for want of time, as he then understood. It thus appears that the course pursued by this deponent was sanctioned by the Senate.

And this deponent deems it also proper to state, in justification of his conduct on this occasion, which has been censured as illegal by more than one member of Congress, that he had previous to this transaction

officially consulted the honorable Felix Grundy, then Attorney General of the United States, as to the discretionary power of the Secretary of the Navy in making contracts for the supply of materials on the quality of which the safety of vessels-of-war mainly depended, such as anchors, cables, ordnance, steam engines, &c. The Secretary was not bound to issue public proposals, or accept the lowest offer, at the imminent risk of getting an inferior article, as it was not to be presumed that Congress, in prescribing this course, intended that the safety of the public ships and lives of all on board should be placed in jeopardy for the sake of perhaps a trifling saving of expense.

And this deponent further saith that, owing (as appears from official letters received at intervals from Mr. Myerle) to the unavoidable obstacles and delays incident to his undertaking, he failed in making his deliveries according to contract : that in virtue of a discretion not unfrequently exercised by the department, when fully satisfied that a contractor had failed in his deliveries not from any fault of his own, but in consequence of obstacles which could neither be foreseen, avoided, or overcome, and that the public interests would sustain no injury, this deponent not only extended the period of delivery, but before he left the department also extended his contract from two hundred to five hundred tons of American water-rotted hemp, deliverable in 1842, in order to encourage him to persevere in his undertaking.

And this deponent further states, that Mr. Myerle, having at length surmounted all obstacles in his way, delivered a quantity of American water-rotted hemp at the Boston navy yard ; that inspectors were appointed to test it with the best quality of Russian hemp, and that, according to their report transmitted to the Navy Department, Mr. Myerle's hemp proved decidedly superior in strength, and fully equal in other respects, except that it, or a portion of it, was somewhat deficient in cleanliness ; that on this ground Mr. Myerle's hemp was rejected, and with what consequence, as this deponent cannot speak from his own personal knowledge, he will not pretend to state.

And this deponent further saith, that in consequence of a change of administration, he had resigned his station as head of the Navy Department, just about the period at which the preceding transaction took place, but he avers that had he remained in office he would have taken effectual measures to remedy as far as possible the injustice of the decision of the inspectors at Boston, by causing his hemp to be received, as he was then and still is of opinion that the superiority of Mr. Myerle's hemp in strength more than counterbalanced any alleged inferiority in cleanliness, and that he had substantially fulfilled his contract according to the understanding of the parties.

And this deponent deems it proper here to state, that he had not at the time of entering into contract with Mr. Myerle, or at any other time, any personal knowledge of the means he possessed for fulfilling his engagements. He made no inquiries on that head. He had a great national object in view, and found a man willing to aid him in its accomplishment. If he succeeded, the country would be greatly benefitted ; if he failed, it would sustain no injury, as there was at that time plenty of Russian hemp on hand to supply the navy for a

considerable time, and, to the best of his recollection, an existing contract for a large additional quantity.

Interrogatory 3d. Do you know of any other matter relative to the claim in question?

Answer. This deponent answering saith: That he does not know of any other matter as to the claim of Mr. Myerle that he can now recollect.

J. K. PAULDING.

DECEMBER 19, 1855.

Signed in the presence of

A. AUSTIN SMITH, *Commissioner*.

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*The answers of Jacob Hall, of Independence, Mo., to interrogatories.*

Interrogatory No. 1 omitted.

Interrogatory No. 2.—Answer. I can state from my personal knowledge, (being a hemp grower myself in Jackson county in the years 1842, 1843, and 1844, and where a portion of Mr. Myerle's operations came under my notice, he carrying on his operations during that period,) that if the government had given that encouragement which first induced him to undertake the enterprise, there would have been at this time abundance of water-rotted hemp produced, sufficient to have supplied the navy and commercial marine of the United States, and a large supply for exportation.

After he had broken down the prejudices against the process of water-rotting, which existed so strongly previous to his efforts, the farmers were preparing to enter largely into the business; and the prices which he was paying (from six to eight dollars per 112 pounds cash) was satisfactory, and considered by them as an ample remuneration for their labor; but the frequent rejections of his hemp discouraged them, and, I am informed, caused his own ruin; and that his mode of operations were well calculated to produce incalculable benefits to the west, by giving a new impetus to the culture of hemp; that it has now become the principal staple of the State, so much so that large exportations are made to the east; that his untiring efforts in this great interest commended him to the confidence of the hemp growers; and, as an evidence of this regard, I remember that in 1843 or 1844 I forwarded him a memorial, signed by a large number of the most prominent of our hemp growers and those who were engaged in its manufacture and shipment, expressing their high consideration for his efforts and sacrifices made in their behalf, with a recommendation also to the government, and to the members of Congress representing our State, asking their interest in his behalf.

I can say further, that both the west and the country generally owes him a debt for the sacrifices he has made in promoting this great interest, and in making our country independent of a foreign production, and in enriching our agricultural interests of the west to millions of dollars annually.



Mr. Myerle visited my place of residence in the summer of 1843. I was induced to water-rot a portion of my crop of hemp for three years in succession. I held on to my hemp until the third year, and then shipped it in one shipment of several tons to the east on my own account, declining to offer it to the government on the ground that I could not run the risk of having it rejected, to injure its reputation for sale as other persons' hemp had been. My hemp sold in New York for \$196 per ton, equal in price to the best Russian hemp in that market at that time. It was, in my opinion, superior to the best Russian, and was one-third stronger.

To the general interrogatory, "Do you know any other matter relative to the claim in question?" he answered, I do not.

JACOB HALL.

DECEMBER 17, 1855.

Signed in the presence of

A. AUSTIN SMITH, *Commissioner*.

*Interrogatories propounded to Amos Kendall and James Story, in the case of David Myerle's claim, with the answers thereto.*

#### INTERROGATORIES TO AMOS KENDALL.

Interrogatory 1st. State your name, occupation, age, place of residence for the past year; whether you have any interest, direct or indirect, in the claim which is now the subject of inquiry, and whether you are related to the claimant.

Answer. My name is Amos Kendall; aged sixty-six years; by occupation the president of the Washington and New Orleans Telegraph Company, and have resided for the past year in Washington county, District of Columbia; I am not related to the claimant, as I am aware of, and have no interest, direct or indirect, in his claim.

Interrogatory 2d. Is it within your knowledge that the government of the United States made many attempts to establish the practicability of supplying the navy with American water-rotted hemp previous to the year 1839?

Answer. I have no knowledge of any attempt being made by the government to supply the navy with American water-rotted hemp prior to the engagement with Mr. Myerle, which I believe was in the year 1839.

Interrogatory 3d. Were these attempts successful?

Answer. Not knowing of any attempts, I cannot answer as to their success.

Interrogatory 4th. Were you a resident of Kentucky prior to 1839; and did you see any hemp water-rotted prior to that year?

Answer. I was a resident of Kentucky from the year 1814 to the year 1829; I never saw any hemp water-rotted in Kentucky prior to 1839.

Interrogatory 5th. What effect did the experiments made prior to

1839 have upon the minds of the inhabitants of the hemp growing region as to the unhealthiness of the water-rotting of hemp; and was or was not water-rotting abandoned?

Answer. I know nothing of the experiment, but I am aware that there was a strong prejudice against water-rotting hemp, arising from the belief that it was unhealthy; on account of this impression as to the unhealthiness of water-rotting, during my residence in Kentucky, it was not practiced.

Interrogatory 6th. Do you know David Myerle?

Answer. I do.

Interrogatory 7th. How long have you known him?

Answer. I cannot say positively, but think for about fifteen or sixteen years, and perhaps longer.

Interrogatory 8th. Do you know anything of the engagements of Mr. Myerle with the Secretary of the Navy, in the years 1839 and 1840, to undertake the enterprise of breaking down the prejudices of the hemp growers of the west?

Answer. I had no knowledge of those engagements of Mr. Myerle with the Secretary of the Navy at the time they were entered into, but afterwards I became familiar with them while investigating the same, as Mr. Myerle's agent, when he applied to Congress for relief.

Interrogatory 9th. Do you know what effect the operations of Mr. Myerle had upon the prejudices, and what was the practical result of his attempts to introduce water-rotted hemp for the navy and commercial marine?

Answer. I know that the process of water-rotting was introduced and practiced in Kentucky subsequent to 1839, and believe that this was in consequence of Mr. Myerle's efforts to break down the prejudices against it. I have no direct knowledge on the subject of the introduction of American water-rotted hemp into the navy or commercial marine, but have understood that, subsequent to 1839, it was used by both.

Interrogatory 10th. Do you know anything about the deliveries of his hemp to the government?

Answer. I have no knowledge on the subject other than that I derived from Mr. Myerle's papers.

Interrogatory 11th. Do you know anything about the frequent rejection of the hemp delivered at the Boston navy yard?

Answer. I have no knowledge on this subject other than what I derived from Mr. Myerle's papers.

Interrogatory 12th. Do you know any other facts appertaining to this case? if so, state them.

Answer. From the year 1829 to the year 1835 I was Fourth Auditor of the Treasury Department, and as such examined all the accounts of the Navy Department. In this position I was led to constant intercourse with the Secretary of Navy, the board of navy commissioners, and many officers of the navy; and that some of them, particularly Commodore Rogers, the chairman of the board of navy commissioners, frequently expressed regret that the process of water-rotting hemp was not introduced into the United States; expressing the opinion that the American hemp, water-rotted, would be superior

to the Russian, giving as a reason for this, that the Russian hemp was injured by the shipment and long voyage.

AMOS KENDALL.

*Cross-interrogatories.*

Cross-interrogatory 1st. What was your business in Kentucky, and had your business at any time any connexion with that of preparing water-rotted hemp?

Answer. My principal business in Kentucky was the editing of a newspaper, and I was never interested in the raising or water-rotting of hemp.

Cross-interrogatory 2d. Have you any personal knowledge of any facts embraced *within the interrogatories*?

Answer. None otherwise than as stated in my answers to the interrogatories in chief.

Cross-interrogatory 3d. Were you not a resident of Washington in 1839, and from that time to this?

Answer. I have lived in and near Washington ever since the year 1829.

Cross-interrogatory 4th. Can you state of your own knowledge that any greater amount of water-rotted hemp is now produced than was produced prior to 1839?

Answer. I cannot from my direct personal knowledge, otherwise than from public documents and general notoriety of the quantity of water-rotted hemp produced before or since 1839, or that any is now used in the navy or commercial marine of the United States.

Cross-interrogatory 5th. Can you state of your own knowledge that any American water-rotted hemp is now used in the navy or commercial marine of the United States?

Answer. I have answered this to the preceding cross-interrogatory.

General interrogatory by the commissioner omitted, was answered, "I do not know."

AMOS KENDALL.

A. AUSTIN SMITH,  
*Commissioner.*

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*Answers of James Story, of Kentucky, to the same interrogatories propounded to Amos Kendall, beginning at No. 4.*

Answer to interrogatory 4th. I was a resident of Kentucky prior to the year 1839, and have known persons to water-rot small quantities of hemp for family use prior to that time.

Answer to interrogatory 5th. The experiments which I saw tried were generally regarded as unhealthy, although families would frequently water-rot small quantities for their own use; to this extent water-rotting was continued.

Answer to 6th. I know David Myerle, and have known him since 1840.

7th answered by the 6th.

8th. I know of no such engagement, but I have heard Mr. Myerle frequently say he had a contract with the Secretary of the Navy to supply it with American water-rotted hemp, and that when he first commenced his work he found great prejudices among the people against it.

9th. His operations convinced the community that water-rotting hemp was not unhealthy. I know that his operations induced many others to engage in the business.

10th. I do not.

11th. Nothing more than I have heard Mr. Myerle himself and others say, viz: that the hemp was rejected.

12th. I was a resident of Midway, Woodford county, Kentucky, in 1840. Mr. Myerle came to my store and told me he had a contract with the government of the United States to supply the navy with American water-rotted hemp. He explained to me his views, and observed that he would make me his confidant, and that I should furnish to his men all their supplies while engaged on the work, and that frequently he would furnish me with money to pay them off, and sometimes to pay his orders for hemp purchased, as he had other places to attend where he was carrying on the same business, if I would encourage the community to sustain him. I was very much pleased with the idea of furnishing his men with all their supplies, as he was to have quite a number of them; and besides it was to introduce a new element of wealth into our country, and I took a deep interest in his welfare, and determined that he should fall into good hands, and rode with him to see the hemp growers and a man to take charge of his work. After he commenced, many persons greatly feared that it would create a pestilence in the country, and held public meetings for the purpose of getting him to discontinue his works, and threatened to tear down his works if he did not discontinue. Mr. Myerle was not in our village at the time. His superintendent (Mr. John Kilby) and myself prevailed on the people to await until I could write to Mr. Myerle, which I did. Mr. Myerle returned, and the people held another meeting, and he declared to them that if it proved unhealthy he would tear down his dams and abandon the work. They admitted this to be a fair offer, and agreed for him to go on with the work, and he did so, and overcame their prejudices entirely, and continued water-rotting until some time in the winter.

After that Mr. Myerle did not continue operations himself, but encouraged the farmers to go into business on their own account, and that he would buy it of them at a liberal price according to quality. While Mr. Myerle was engaged in the business he had about a dozen pools in Woodford and the surrounding counties, but I only saw one. A portion of his hemp which I saw was, in my opinion at the time, very good, and a portion very bad; this was the first place he commenced operations, and I understood him to say that all his hemp was rejected by the Navy Department, and he, as I understood him, thought unjustly; but he continued to encourage others to water-rot, and quite a number engaged in it—and I for one—and sold him a lot of hemp in Missouri, in 1843. With the experience I had, by seeing

his operations, and knowing the price the government was to give, I was induced to close up my business in Midway, Kentucky, and moved to Missouri in 1841, and purchased a hemp farm with the view of water-rotting; and in 1842 raised and water-rotted hemp, and sold it to Mr. Myerle in 1843; and raised another crop in 1843, and water-rotted a portion of it, but could not succeed in selling it to the government agent in St. Louis. He would continue to say that it was not well cleaned of shives and tow. I found I was to lose a great deal of money if I was not to succeed in making an article of hemp to suit navy purposes; so, early in the year 1844, I was at St. Louis, and made inquiries of the manufacturers there what the tow of water-rotted hemp would be worth, and found that my hemp would produce no more than one-third tow. I still could make the business profitable if I could get the navy agent to receive it thus prepared. So, in the spring of 1844, I determined that if there was such a thing as making an article to suit for naval purposes, that I would make it that year. I took great pains to prepare my land and sow my hemp at the proper time to make the best article; I cut it, as I conceived, at the most suitable time, and tied it in small bundles, and cut off the tops of it, as it was thought that the fibre was not as good as it was lower down; and water-rotted it with great care, and to the very best advantage, and broke it out, and scutched and hackelled it, and baled and covered it with good osnaburg cotton. I have seen many specimens of Russian hemp, but never have seen many, in my opinion, as far as I can judge, as good as the specimen prepared as I have just stated; and this was rejected; and then I made up my mind that I could not make hemp for navy purposes, and quit the business.

*Cross-interrogatories.*

Answer to cross-interrogatory 1st. My business was merchandising, and I have seen small quantities of hemp water-rotted; but my business while in Kentucky never was that of water-rotting, or preparing hemp in that way; I did, as I have before stated, water-rot in Missouri.

Answer to cross-interrogatory 2d. Nothing that I can now recollect, except what I have stated in my former answers.

Answer to cross-interrogatory 3d. I was not, and never have been, a resident of Washington.

Answer to cross-interrogatory 4th. I do not know of any more being produced, and I do not believe that there is, for hemp growers have found that they could not produce an article to suit the navy, and have generally quit it.

Answer to cross-interrogatory 5th. I cannot.

JAMES STORY.

A. AUSTIN SMITH, *Com'r.*

*Interrogatories propounded to Henry Wallace, Charles B. Lewis, William R. Bradford, Henry Von Pheel, Charles D. Loveland, Robert Aull, James W. Roberts, and Thomas E. Courtenay, and their answers.*

INTERROGATORIES AND ANSWERS BY HENRY WALLACE.

Interrogatory first. What is your name, age, occupation, place of residence for the past year ; and are you related to the claimant, and have you any interest in his claim ?

Answer. My name is Henry Wallace ; my age is sixty-four years ; I am a farmer by occupation ; for the past year and more my place of residence has been, and is, in Lafayette county, near the city of Lexington, Missouri. I am not related to the claimant, and have no interest in his claim.

Interrogatory second. State what was the condition of feeling and opinion in Kentucky or Missouri prior to 1840 as to the healthfulness or noxiousness of the water-rotting of hemp, and also what you know of the exertions and experiments of David Myerle, in either of those States, and to what extent those experiments and exertions changed the feeling and opinion above alluded to, and induced the farmers of either of those States to engage in the raising and water-rotting of hemp.

Answer. I believe it was in the year 1840 that David Myerle, the claimant, commenced his experiments in water-rotting hemp, in the State of Kentucky, in which State I then resided ; and prior to that time, I have no recollection of attempts at water-rotting in that State, and cannot state what was the condition of feeling and opinion in Kentucky or Missouri before that time as to the healthfulness or noxiousness of the water-rotting of hemp ; but deponent states, that soon after said Myerle commenced his experiments in the neighborhood of Midway, Woodford county, Kentucky, where I then resided, public feeling became aroused and excited, from an impression entertained by many that the water-rotting process was very deleterious and unhealthy, not only to those who worked at it, but to the whole neighborhood, and that the water in which it was rotted would kill all kinds of stock that might drink of it ; and so prevalent was this state of feeling and opinion, and so violent and decided the opposition, that said claimant, Myerle, had much difficulty in procuring locations for his pools, and had to keep them up, and prosecute his experiments, against threats to destroy his pools and prevent his operations. Under that state of things, deponent says, that said Myerle, unwilling to abandon his experiments, and continuing them, was compelled to pay double price for the hemp he used and for hands necessary in prosecuting his experiments. Deponent states that said Myerle's experiments resulted in success, and all persons in the neighborhood became satisfied that hemp could be water-rotted without danger or injury to the health of man or beast. All opposition ceased in the neighborhood ; and the farmers, with the prospect of better prices and larger profits, engaged the next year more extensively in the growing of hemp ; and, I think, double the quantity

was grown this next year; and if the government had received the hemp delivered by Myerle, under his contract, deponent believes water-rotting would have been common and general with the farmers in that part of the State. Deponent states, said Myerle had pools and made experiments in other counties of Kentucky, but deponent has no personal knowledge of the history of those experiments, or of their influence on public feeling and opinion.

Deponent would further state, that the rejection of the hemp delivered by said Myerle, under his contract with the government, operated to discourage the farmers in water-rotting their hemp, notwithstanding many of them believed they had fully succeeded in making an article superior to the Russian hemp; and they discontinued water-rotting, as deponent believes, only because of the greater expense necessary in the process and the want of a remunerating price.

*Cross-interrogatories.*

Where did you reside in 1840 and since?

Answer. I resided in Woodford county, Kentucky, in 1840, and continuously up to 1844, when I removed to Lafayette county, Missouri, where I have been residing ever since.

Cross-interrogatory 2d. Was there any fixed or settled opinion in the neighborhood of your residence at that time on the subject of the unhealthiness of the business of water-rotting hemp?

Answer. I have no recollection of having any knowledge of any fixed or settled opinion in my neighborhood on the subject of the unhealthiness of the business of water-rotting hemp, and remember no efforts or experiments in that business that would have called out an expression or manifestation of feeling or opinion, until the claimant, Myerle, commenced his experiments, a history of which, as they called forth or affected the feelings and opinions of the neighborhood, I have given in my examination in chief.

Cross-interrogatory 3d. What other means than experiment was resorted to to disabuse the public mind of this notion? If you know of any other means having been used state what it was, and by whom.

Answer. I know of no other means, except that the claimant, Myerle, seemed to be active, persevering and efficient, in securing the co-operation of the farmers, by personal intercourse, argument and persuasion.

Cross-interrogatory 4th. Was not the offer of a good price for the article all-sufficient to induce persons to make the experiments?

Answer. In my opinion the offer of a good price would not have been sufficient; the farmers needed information and instruction as to the mode as well as cost of water-rotting, without which I do not believe they would have made experiments.

Cross-interrogatory 5th. Was not Myerle's connexion with the business unfortunate, and did not his mismanagement and failure, for a time, discourage the production of the article, after the high prices offered by the government had caused sufficient experiments to be made to test the safety of the business?

Answer. Deponent is informed and believes that Myerle's con-

nexion with the water-rotting business was unfortunate to himself, and may have occasioned loss to others; but deponent knows of no mismanagement on the part of Myerle, and deponent knows of no failure of his, except in the loss of his means in prosecuting water-rotting experiments. The farmers may have been, in some degree, discouraged by Myerle's failure in money matters; but deponent believes that after the safety of the business was tested, it was the rejection of the hemp delivered by Myerle under his contract, the want of adequate price, and the uncertainty of getting the government agents to approve and receive the hemp they might produce, that discouraged the farmers in the water-rotting business, and induced them to abandon it. Deponent further states that, having now fully answered the interrogatories propounded to him, he does not know of any other matters relative to the claim in question; and further deponent saith not.

HENRY WALLACE.

WM. T. WOOD, Com'r.

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*Answer to interrogatories by Charles B. Lewis.*

Answer to interrogatory 1st. My age is fifty-six; my name is Charles B. Lewis; my occupation a farmer, and my place of residence for the past year and for thirty-five years past, Scott county, Kentucky. I am in no way related to the claimant, and have no interest in his claim.

Answer to interrogatory 2d. I know nothing of the opinion in Missouri in relation to the healthfulness of water-rotting hemp. Prior to 1840, my opinion, and that of the community generally, was, that said business was unhealthy. In 1840 D. Myerle established a water-rotting establishment on my farm, and by experiment there made did, to a great extent, change the public opinion in regard to the matter; that experiment involved and required great labor, trouble, and expense, and said Myerle used great energy and industry in making the experiment; the experiment induced a great many farmers in Kentucky to engage in that business.

*Cross-interrogatories.*

Answer to cross-interrogatory 1st. I have already answered that question.

Answer to cross-interrogatory 2d. I have already stated that said business was, in my opinion and in that of the community in which I resided, unhealthy; but how fixed or settled that opinion was I cannot state.

Answer to cross-interrogatory 3d. The only means I know of was the experiment and the representations and exertions of Myerle.

Answer to cross-interrogatory 4th. Notwithstanding the high price, my opinion is that the farmers would not have engaged in it, but for the experiment and exertions of Myerle at that time, such was the prejudice against the business.



Answer to cross-interrogatory 5th. Myerle's connexion with the business was unfortunate to himself personally and to others, but not as it affects the business; Myerle's management or failure did not affect the production of the article anything like as much as the change of price.

CHARLES B. LEWIS.  
ALVIN DUVALL, *Com'r.*

*Answers to interrogatories by William R. Bradford.*

Answer to interrogatory 1st. My name is William Russell Bradford; aged forty-two years on the 5th of January, 1856; occupation, a clerk in the United States Patent Office, and have resided for the past year in Washington, D. C. I am not related to the claimant, and have no interest in his claim.

Answer to interrogatory 2d. Prior to Myerle's coming to Kentucky, I well remember, there was much prejudice in the community generally against the process of water-rotting hemp, believing it unhealthy. I am quite certain that he entirely removed these prejudices, thereby inducing his system of water-rotting to become popular among the farmers, and a consequent increase in the production of the article in Kentucky. I know nothing as to Missouri.

*Cross-interrogatories.*

Answer to cross-interrogatory 1st. In Lexington, Kentucky, up to September, 1847; since then in Washington, D. C.

Answer to cross-interrogatory 2d. Not understanding the question at the time, I can only say that it was generally thought to be unhealthy, until Mr. Myerle visited Kentucky and induced a different belief.

Answer to cross-interrogatory 3d. I do not know.

Answer to cross-interrogatory 4th. Not knowing what the offer was, I cannot answer the question.

Answer to cross-interrogatory 5th. I do not know.

Answer to general interrogatory. I do not.

WM. R. BRADFORD.  
A. AUSTIN SMITH, *Com'r.*

*Answers of Henry Von Pheel to interrogatories.*

Answer to interrogatory 1st. My name is Henry Von Pheel; my occupation, wholesale merchant—that is to say, a wholesale grocer, forwarding and commission merchant; my place of residence is St. Louis, Missouri. I am not related to claimant in any way, and have no interest in his claim.

Answer to interrogatory 2d. The condition of feeling and opinion, so far as I have understood and believe, in Kentucky and Missouri, prior to 1840, as to the healthfulness or noxiousness of the water-rotting of hemp, was, that it was deleterious to health. I have understood that David Myerle made great exertions in making experiments and inducing the farmers of Missouri to water-rot their hemp. As to what extent those experiments and exertions changed the feelings and opinions above alluded to I cannot say, but can state that prior to 1840 the quantity of hemp raised in Missouri and ——— was quite limited; since that time the quantity grown in Missouri has been greatly augmented. In 1842 the quantity brought to the St. Louis market did not fall far short of 4,000 tons of dew-rotted, but very little, if any, water-rotted. In 1843 there were from 5,000 to 6,000 tons of dew-rotted, and about 400 tons of water-rotted.

*Cross-interrogatories.*

Answer to cross-interrogatory 1st. I resided in St. Louis, Missouri, in 1840, and have ever since.

Answer to cross-interrogatory 2d. It was the opinion generally throughout the hemp-growing district of the country that the process of water-rotting was unhealthy.

Answer to cross-interrogatory 3d. As to what other means than the experiments were resorted to to disabuse the public mind of this notion cannot say.

Answer to cross-interrogatory 4th. Cannot say.

Answer to cross-interrogatory 5th. I do not know, of my own knowledge, that it was; have understood it was; cannot say that it did or not, but understand that the discouragement was caused by the difficulty of getting it passed at the navy yards at the east. I do not know of any other matter relative to the claim in question.

H. VON PHEEL.

CHARLES H. TILSON, Com'r.

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*Answers of Robert Aull to interrogatories.*

Answer to interrogatory 1st. My name is Robert Aull; age, forty-eight years; occupation, a banker; place of residence for the past year, and for about eighteen years past, in Lexington, Missouri. I am not related to the claimant, and have no interest in his claim.

Answer to interrogatory 2d. I know nothing of the condition of the feelings and opinion in Kentucky in 1840, or prior or subsequent, as to the healthfulness or noxiousness of water-rotted hemp; my knowledge on that subject was and is limited to Missouri. In Missouri, prior to 1840, and prior to the time of the visit of David Myerle to the State of Missouri, the feeling and opinion was generally prevalent that water-rotting of hemp was prejudicial to health, and would produce sickness and death, and hemp-growers were afraid to hazard the health and lives of their hands in water-rotting hemp. In 1840 I was engaged

in the purchase and manufacture of hemp, and well acquainted with many of the hemp-growers, and became acquainted with the claimant, David Myerle, on his visits to Missouri, and know that he used much exertion to induce the farmers to water-rot their hemp, and offered to contract for water-rotted hemp. I saw him frequently, and he always seemed active and anxious in urging and pressing the farmers to engage in the business of water-rotting; but I have no knowledge of any experiments that were made by Myerle, and have no knowledge of any change in the condition of public feeling and opinion as to the healthfulness or noxiousness of that business. I know that a few farmers, to a limited extent, made experiments in water-rotting; but whether they were induced to do so by Myerle, or whether those experiments resulted in any changes of feeling and opinion as to the healthiness or noxiousness of the business, deponent does not know.

*Cross-interrogatories.*

Answer to cross-interrogatory 1st. I resided in Lexington, Missouri, in 1840, and since.

Answer to cross-interrogatory 2d. In some way the opinion prevailed that that business was unhealthy, and that opinion seemed to be fixed and settled at the time alluded to in the interrogatory.

Answer to cross-interrogatory 3d. I know of no means used, for the purpose stated in the interrogatory, except by Myerle, and by him only, in the way I have before stated.

Answer to cross-interrogatory 4th. In my opinion, the price offered by Myerle was a good price, and was so considered by all, and, nevertheless, it failed to induce persons to engage in the business; I therefore conclude, that the offer of a good price was not all-sufficient to induce farmers to water-rot their hemp.

Answer to interrogatory 5th. I have no knowledge and no reason to believe that Myerle's connexion with this business was unfortunate to the government; and I can only state, from reports and hearsay, that it was unfortunate to himself. I know nothing of mismanagement or failure on his part, and I have no knowledge of experiments having been made by Myerle or others in Missouri, sufficient to test the safety of the business, either under the high prices offered by the government, or from other influence.

Deponent states that he knows of no other matter relative to the matter in question; and further saith not.

ROBERT AULL.

W. T. WOOD, *Commissioner,*  
*Lexington, Mo.*

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*Answers of James W. Roberts to interrogatories.*

Answer to interrogatory 1st. My name is James W. Roberts; my age is thirty-eight years; I am a merchant; I reside in St. Louis,

Missouri; I am not related to the claimant, and have no interest in his claim.

Answer to interrogatory 2d. I know nothing personally about the feelings of the farmers in Kentucky and Missouri as regards hemp prior to 1840. In 1842 and 1843 I was book-keeper in the house of W. W. Thompson & Company, of St. Louis; David Myerle, the claimant, was then engaged in travelling through the State of Missouri, purchasing water-rotted hemp, and trying to persuade the farmers to engage in its culture. The hemp purchased by him was shipped to Thompson & Co., who paid for the same, and on the return of Myerle he superintended the hackeling and its preparation for market, when it was shipped to Boston for the Charlestown navy yard. The amount expended in this operation in 1843 was eight thousand seven hundred and sixty-eight dollars and fourteen cents, exclusive of Thompson & Co.'s commissions and Myerle's expenses; to which must be added freight and charges at Boston, about twenty dollars a ton, and insurance  $2\frac{1}{2}$  per cent. These shipments resulted in heavy losses to Myerle. I have read the letter dated St. Louis, December 14, 1843, signed W. W. Thompson & Co., and made part of this deposition; it was written by W. W. Thompson, since deceased, and, from my knowledge of the matter, I believe it to be true in every particular.

*Cross-interrogatories.*

Answer to cross-interrogatory 1st. In 1840 I resided in Illinois; since March, 1842, I have resided in St. Louis, Missouri.

Answer to cross-interrogatory 2d. The planters of Missouri, who I heard speak on the subject, objected to the water-rotting of hemp, on account of unhealthiness to their hands. Mr. Myerle appeared to make it his sole business to disabuse the public mind of this notion, and induced the farmers to engage in the business.

Answer to cross-interrogatory 3d. I have stated in my last answer.

Answer to cross-interrogatory 4th. I do not believe that the price then offered would have induced the planters of Missouri to engage in the business without the exertions of Mr. Myerle in the matter.

Answer to cross-interrogatory 5th. Mr. Myerle's connexion with the business was certainly unfortunate for himself, but I do not know anything about his failure or mismanagement.

JAMES W. ROBERTS.

CHARLES H. TILSON, *Com'r.*

*Letter referred to in the 2d interrogatory of James W. Roberts.*

ST. LOUIS, December 14, 1843.

DEAR SIR: It is with pleasure I state the efforts you have made in this State, and the adjoining one, for the promotion of the water-rotting process of hemp, and I can bear witness that your exertions have been untiring, and have been of inestimable value to the whole section of the country, as viewed by the expressions of very many farmers

who have called on you in this city. You have expended both time and money in the prosecution of this object, and I can say that you have succeeded most triumphantly in adding one more article to the great staples of the country. I have shipped this year for your account to Boston, New York, and Europe, over 100 tons of water-rotted hemp, which has been pronounced by good judges equal and superior to Russia. Your losses in these shipments will be large. It is my firm opinion that the course you have this season adopted at a great cost has established the production of this article. The ratio next season will be four-fold, bidding fair in a few years to be an extensive article of export to Europe.

In conclusion, I may say, from my intimate knowledge of your proceedings, that you are entitled to the full support of government and the reward of your country.

Yours, truly,

W. W. THOMPSON.

DAVID MYERLE, Esq.

*Answer to interrogatories by Thomas E. Courtenay.*

Answer to interrogatory 1st. My name is Thomas E. Courtenay ; aged thirty-three years ; commission merchant by occupation, and have resided for the past year in St. Louis, Missouri. I am not related to the claimant, and have no interest in his claim.

Answer to interrogatory 2d. I have no personal knowledge of David Myerle's operation in Kentucky, but have heard that his efforts in that State to promote the proper culture of water-rotted hemp greatly benefitted the farmers. I know, from my own knowledge, that previous to 1842 the farmers of Missouri were much prejudiced against the culture of water-rotted hemp, and that Mr. Myerle was instrumental in a great measure in inducing farmers to adopt his process and plans, thereby producing an article of hemp pronounced by competent judges to be equal, if not superior, to the best Russian. I also know that Mr. Myerle spent much time and money in travelling through Missouri, the better to promote the culture of this important staple to our country. I also know, that during the year 1843 he was engaged in preparing, hackeling, and baling a large quantity of water-rotted hemp, which, I was informed, he had purchased for the government of the United States. I can say that it was superior to any shipped from St. Louis ; and, on account of the superior process in baling, it was frequently shipped at lower rates than other hemp. I have also heard Messrs. W. W. Thompson & Co. say that the hemp prepared by Mr. Myerle was rejected by the government, thereby entailing on Mr. Myerle so great a loss that it would seriously involve him.

*Cross-interrogatories.*

Answer to cross-interrogatory 1st. I was in Europe in 1840, and since 1842 I have resided in St. Louis, Missouri.

Answer to cross-interrogatory 2d. I know that prior to 1842 the farmers of Missouri were prejudiced against the culture of water-rotted hemp, but for what cause I am not aware.

Answer to cross-interrogatory 3d. I am not aware of any.

Answer to cross-interrogatory 4th. I cannot say.

Answer to cross-interrogatory 5th. I do not believe that any operations of Mr. Myerle discouraged the culture of hemp in either Kentucky or Missouri ; on the contrary, his efforts encouraged the production of a better quality of hemp in these States, which has been crowned with success, as proved by the rapid increase of the article since 1843.

Answer to general interrogatory. I am not aware of anything further relative to this matter.

T. E. COURTENAY.

A. AUSTIN SMITH, *Com'r.*

*Answers of C. D. Loveland to the same interrogatories propounded to Henry Wallace and others.*

Answer to interrogatory 1st. My name is Charles D. Loveland ; my age 41 years ; my occupation a physician ; place of residence for the past year Havana, Illinois ; am not a relative to the claimant, David Myerle, and have no interest in the claim of said claimant against the United States.

Answer to interrogatory 2d. The strongest objection to the increase of the hemp crops in Missouri, with a view to water-rotting, was the declared noxiousness to health. To remove these prejudices among hemp-raisers was the difficult work. Do not know much about the experiments of David Myerle in Missouri. I know that through exertions made by myself, as the agent of David Myerle, in the counties of Saline and Lafayette, that the hemp crops were largely increased, and water-rotting was adopted as the general process of curing and preparing hemp for market.

*Cross-interrogatories.*

Answer to cross-interrogatory 1st. In the year 1840 I lived in Missouri, and since in Illinois.

Answer to cross-interrogatory 2d. The prejudice throughout the entire district in which I resided in 1839 was against water-rotting hemp ; it was almost irremovable.

Answer to interrogatory 3d. I know of no other means but my own exertions, as the agent of David Myerle, in giving farmers confidence in the raising of hemp for the purpose of water-rotting.

Answer to cross-interrogatory 4th. The price was some inducement, but I think not sufficient to overcome the prejudices against water-rotting hemp immediately, and until sufficient experiments had satisfied the farmers that the business was not so unhealthy as they then supposed it to be.

Answer to cross-interrogatory 5th. After the year 1840 I was not acquainted with Mr. Myerle's business, and cannot say what happened, of my own personal knowledge.

C. D. LOVELAND.  
N. J. ROCKLAND,  
Com'r.

*Evidence taken in behalf of the United States.*

Interrogatory 1st. What is your name, age, and occupation?

Answer. My name is William Cabin; I reside in Charlestown, Massachusetts; age forty-seven; am a rope-maker by trade; have been between seventeen and eighteen years in the employment of the government, at Charlestown. I resigned my post of superintendent of the rope walk in August last; since when I have not been in the employment of the government.

Interrogatory 2d. Were you acquainted in 1840 with the qualities of water and dew-rotted hemp; if so, state how those articles are distinguished; in what they differ in qualities; and also how you obtained your knowledge on the subject?

Answer. Prior to 1840 I had seen but very little American water-rotted hemp; the most I had seen came from the State of Connecticut, that was said to be water-rotted. The water-rotted hemp is of a brighter color, more free from glutinous substance, and differs from dew-rotted in the smell and odor of the hemp, and its general appearance; they cannot very well be mistaken for each other by any one of experience.

The water-rotted hemp is more valuable, because a certain injurious acid matter is removed thereby; the lint is more free from gluten. It is usually a stronger hemp; it makes brighter rope; it takes and holds tar better, because the tar does not readily penetrate the gluten remaining on the dew-rotted hemp. The water-rotted usually works more free than the other. Another object of water rotted-hemp, it is intended to be cleaner than dew-rotted, that the fibre may be more easily separated from the woody particles.

I obtained my knowledge by experience as a rope-maker.

Interrogatory 3d. Were you present when it was inspected or tested; if so, state the tests to which it was subjected, and state also how it compared with other American hemp then offered in the Boston market, in appearance, color, strength, cleanliness, quantity of tow, and price? Did you examine any of the hemp offered by claimant that year at the navy yard at Charlestown; if so, state when and where, and how much?

Answer. About the year 1841—March, I think—about twenty tons of hemp arrived at the navy yard, which was said to be prepared by Mr. Myerle, water-rotted. Mr. T. Whitmore, then the superintendent of the rope walk, said that it was to be examined; that Mr. Myerle had contracted that it should be in all respects equal to the best Riga hemp. The matter is fresh in my memory. A few days subsequent to this, a bale was opened, and some of it given to the hacklers. Lieuts. Van Brunt, Pope, Totten, and Mr. Whitmore, were present,

I understood, as examining officers; they overhauled it, looked at it, gave opinions as to its quality, &c. I looked at it also; tried the strength of some of its fibres.

Interrogatory 4th. Were you present when it was inspected or tested? If so, state the tests to which it was subjected; and also state how it compared with other American hemp then offered in the Boston market—in appearance, color, strength, cleanliness, quantity of tow, and price.

Answer. I was acting foreman of the rope walk, and was present; between eleven and twelve hundred pounds were taken as a sample; it was hackled, and then tested. A report was made of the results, a copy of which is appended; I did not assist in hackeling, though I saw them doing it; I took the yarns after they were spun and manufactured the rope, and delivered it to the surveying officers; I manufactured the rope to the best of my knowledge; I was present at part of the trials of the strength of the rope; I think the hemp was of a brighter color than the common dew-rotted American hemp in the markets, although not so bright as the Russian; it was not so clean as some of the samples of the American hemp they obtained in Boston; there was a much greater quantity of tow than in the Riga hemp, and more waste; there was more also than in any samples I saw there of the American hemp. The samples exhibited of the American dew-rotted hemp, with which the comparison was made, had been hackled, and were already nearly cleaned from dirt or waste tow, or nearly so. I am not cognizant as to whether the American dew-rotted was spun up into yarn for the purpose of comparison; if it was, the report of the surveying officers will show.

Interrogatory 5th. Did you compare the hemp offered by Myerle with the sample furnished or shown to him as the standard? If so, how did it compare?

Answer. There were samples of Riga hemp got out at the time for the purpose of comparison; it was Riga Rhine, or the best clean Russian hemp. Mr. Myerle's hemp possessed greater strength after being freed from the tow, and otherwise cleaned and prepared and made into rope; the deficiencies were, that it yielded a greater quantity of tow and dirt. I am not in possession of the comparative tests, but presume the surveying board furnished the department with these tests; it was my opinion, at the time, that Mr. Myerle's hemp was too much prepared—that is, he had put so much work in the preparation that he had overbroken his hemp and broke a good many fibres, so that it made much more tow than it would if it had been less broken. It is more difficult to clean water-rotted than dew-rotted hemp in preparing it for market.

Interrogatory 6th. State any other matter which may benefit the United States that you may know.

Answer. I think the surveying officers were fair in their examination; a great interest was expressed by the officers in favor of water-rotted hemp. The contract between Mr. Myerle and the government was handed to the inspecting officers, and they were testing it literally by the standard there set out; that in all respects it was to compare with the Riga Rhine. In comparison with dew-rotted hemp, Mr.



Myerle's hemp was stronger than the average of dew-rotted ; the color was brighter than the average dew-rotted, and, being water-rotted, the price should be higher.

Cross-interrogatory. State what you know of the quality of the hemp offered by David Myerle for the use of the government at the Charlestown navy yard ; and also any circumstances connected with the rejection of the hemp ; and also whether any American water-rotted hemp had been introduced into the Boston market prior to 1840 for the navy and commercial marine.

Answer. I have already answered the most of this interrogatory. This was the first lot of American water-rotted hemp that I ever knew offered to the government ; nor did I know of any in the market at that time. I had seen a few specimens of Connecticut water-rotted hemp some years before, when the government gave a bounty for it ; but it had gone out of the market after the bounty had ceased.

Cross-interrogatory 2d. With more care in the cleansing of the hemp of Mr. Myerle, how would it have compared with the Russian hemp ?

Answer. I think it would have compared favorably.

Cross-interrogatory 3d. How many lots, subsequent to this one, were received at the yard from Mr. Myerle, or Lombard & Whitmore, his agents, and what was their quality ?

Answer. I think there were three other lots received there from them in 1842-'43. There was a decided improvement in quality ; one lot was decided to be fit for naval purposes, and received under the general standard test of the yard, and the other two lots were superior to the first lot delivered in 1841.

Cross-interrogatory 4th. What proportion of American water-rotted hemp is now used for naval purposes ?

Answer. I should think about one-quarter part of all used in the navy is American water-rotted.

Cross-interrogatory 5th. To what cause do you attribute the superior strength of the American water-rotted hemp over the Russian ?

Answer. As a general thing, the American water-rotted hemp is stronger than the Russian, but not always. This is attributed to natural causes, as seed, soil, and climate.

Cross-interrogatory 6th. Were there not strong prejudices against American hemp in the minds of manufacturers and workmen prior to 1841 ?

Answer. So far as my knowledge extends, there were. The reasons are, that it was harder to manufacture, because it contained a great quantity of woody particles ; it was not properly packed in the bales, lying in snarls and bunches, and being towy, and was generally dirty. All this required more labor to make rope, although the rope might be as strong, or stronger, after it was made.

This prejudice had decreased very much of late years, as the preparation of the hemp has improved. When the American water-rotted hemp is prepared as it should be, I consider it superior to the average Russian hemp.

WM. CABIN.  
CHARLES L. WOODBURY,  
*Commissioner.*

*Interrogatories propounded to Israel Lombard, Benjamin Sewall, and Wm. D. Porter, United States navy, with the answers thereto.*

INTERROGATORIES TO ISRAEL LOMBARD.

Interrogatory 1st. What is your name, age, occupation, place of residence for the past year, and are you related to the claimant, and have you any interest in the claim?

Answer 1st. My name is Israel Lombard ; my occupation is that of merchant, and I reside in Boston ; I am not related to the claimant, and I have no interest in the claim.

Interrogatory 2d. State what you know of the quality of hemp offered by David Myerle for the use of the government at the Charlestown navy yard, and any circumstances within your knowledge connected with the rejection of that hemp ; and also whether any American water-rotted hemp had been introduced into the Boston market prior to 1840 for the navy and commercial marine.

Answer to interrogatory 2d. The quality, in my opinion, was fully equal to that of the best Russian hemp. We delivered samples of some seventy tons, all of which were rejected. The only particular reason for the rejection assigned to me was that the fibre was too long to work to advantage ; the general answer to my inquiries was, that it would not answer. I have no knowledge of American hemp prior to the year 1842 or 1843 ; I was well acquainted with the quality of Russian hemp, and had dealt largely in it prior to that time. The seventy tons of which I have spoken was consigned to my firm, of Lombard and Whitmore, by Mr. Myerle, from St. Louis, to be delivered at the navy yard. The fibre of this hemp was much longer than that of Russian hemp, and, in my opinion, better on that account for making into cordage ; subsequently, I do not recollect precisely at what time, we sent the samples of another parcel of about half a ton of the same description, which was received. I do not think it was any better than the first parcel.

*Cross-interrogatories.*

Cross-interrogatory 1st. Were you acquainted in 1840 with the qualities of water-rotted and dew-rotted hemp ? If so, state how those articles are distinguished, in what they differ in qualities, and also how you obtained your knowledge on the subject.

Answer to cross-interrogatory 1st. My knowledge of American hemp began in 1842 or 1843, as I have stated. Water-rotted hemp, of American make, is of the same description as the best Russian hemp ; it is softer in fibre, and the color much brighter than that of the dew-rotted ; I am not familiar with the process of preparing the two kinds ; my knowledge arises from dealing largely in Russian hemp.

Cross-interrogatory 2d. Did you examine any of the hemp offered by the claimant that year at the navy yard at Charlestown ? If so, state when and where, and how much of it you saw.

Answer to interrogatory 2d. I examined the entire parcel of hemp that was offered at the navy yard by Mr. Myerle in 1843 ; I have no knowledge of any offered in 1840 ; it was examined in the warehouse of Lombard & Whitmore.

Cross-interrogatory 3d. Were you present when it was inspected or tested? If so, state the tests to which it was subjected, and state also how it compared with other American hemp then offered in Boston market, in appearance, color, strength, cleanliness, quantity of tow, and price.

Answer to cross-interrogatory 3d. I was not present when it was tested ; my recollection is, that its quality was equal to that of any other American hemp then in the market, and superior to most ; the price I do not recollect.

Cross-interrogatory 4th. Did you compare the hemp offered by Mr. Myerle with the sample furnished or shown to him as the standard? If so, how did it compare?

Answer to cross-interrogatory 4th. I saw no sample or standard with which this was to be compared.

ISRAEL LOMBARD.  
D. S. GILCHRIST, *Com'r.*

*Answers of Benj'n Sewall to interrogatories.*

Answer to interrogatory 1st. My name is Benjamin Sewall ; my age sixty-six years ; my residence is at Newton, in Massachusetts ; my occupation that of merchant ; I am not related to the claimant, and have no interest in the claim.

Answer to interrogatory 2d. I know that I purchased from Lombard & Whitmore, in the year 1843, water-rotted hemp, which I understood was furnished by David Myerle for the use of the navy yard, and found it a very perfect article—clean, free from tow, and of strong fibre ; do not know that American water-rotted hemp had been furnished to the navy prior to 1840, or to the Boston market.

*Cross-interrogatories.*

Answer to cross-interrogatory 1st. I was acquainted with the qualities of water-rotted and dew-rotted hemp ; have been familiar with hemp from having dealt in it for a long time, both in buying and selling and in the manufacturing cordage ; water-rotted hemp is of brighter color and softer fibre than dew-rotted, and has been considered much more valuable for manufacture of cordage than dew-rotted.

Answer to cross-interrogatory 2d. I do not recollect that I did.

Answer to cross-interrogatory 3d. I was not present.

Answer to cross-interrogatory 4th. I did not.

BENJ'N SEWALL.  
D. S. GILCHRIST, *Com'r.*

*Interrogatories to and answers of Lieut. Wm. D. Porter, United States navy—same as propounded to Israel Lombard.*

Answer to interrogatory 1st. I am named Wm. D. Porter, of the United States navy; aged about forty-six years, and have resided in the city of New York during the past year. I am not related to the claimant, and have no interest in the claim, either directly or indirectly.

Answer 2d. Commodore Jno. Nicholson was one of the Board of Navy Commissioners in 1840 and 1841, when the shipment of Myerle's hemp was made: subsequently he took the command of the Charlestown navy yard. Mr. Myerle and myself met Commodore Nicholson at the foot of the Capitol, on Pennsylvania Avenue, in Washington, in January, 1846. He stated, in my presence, to Mr. David Myerle, You (Mr. Myerle) have been "damned badly treated, and your hemp should never have been rejected." Subsequently I met Commodore Nicholson in the rotundo of the Capitol; it was in the same month and year; he remarked that the hemp was not to be rejected by the government, as it was an experiment to introduce American water-rotted hemp into the navy; that Mr. Myerle's hemp was rejected from corrupt influences, and he (Com. Nicholson) did all in his power to prevent it from being rejected while a member of the board; and Mr. Myerle should have, if justice was done him, every cent of his claim; and the country could not do too much for him. In 1846, at Piney Point, in Maryland, I had a conversation with Commodore Wadsworth, who stated that Mr. Myerle had, by introducing western products, in the shape of water-rotted hemp, brought to the navy friends, and again built it up; in fact, he had saved the navy, as it was becoming unpopular; he thought Mr. Myerle should be amply rewarded for his efforts in introducing American water-rotted hemp into the navy. I do not know that any American water-rotted hemp was ever introduced into the Boston market prior to 1840 for any purpose.

W. D. PORTER.

*Cross-interrogatories.*

Answer to cross-interrogatory 1st. I became acquainted with the qualities of American water-rotted hemp in my official capacity as an officer of the navy. There was no American water-rotted hemp introduced in the navy, to my knowledge, prior to 1840. I was and am fully acquainted with the difference between water and dew-rotted hemp. These articles are distinguished by their qualities, color, amount of tow, strength, gloss, &c. Water-rotted hemp is prepared by immersion in water for a certain length of time. Dew-rotted is prepared by exposure to dews and night air. Water-rotted hemp is superior to dew-rotted, as it is not deprived of its resinous quality, which is insoluble in water. This resin is called "*haschis*," and is used as a narcotic by eastern nations.

The essential oil in the "*haschis*" prevents the hemp from absorbing too much water, or retaining it, and seems to add to its strength;

it enables the hemp to hold tar better than dew-rotted. In dew-rotted hemp the tar constantly drips from it in hot weather, and in a short period it is deprived of tar, and soon rots. In 1840 there was no American water-rotted hemp in the navy, and none until the experiments made by Mr. Myerle. Since that period the navy was supplied with American water-rotted hemp.—(See Secretary Mason's annual report, December 4, 1848.)

The character of American water-rotted hemp was superior to any other known, (not excepting the best Russian or Liberian hemp.) After Mr. Myerle abandoned the business of the government, which was, to the best of my knowledge, in 1846, on account of his difficulties with the government in the frequent rejections of his hemp, to which period the statistics show that there was an abundance of American water-rotted hemp in the market at this date, and the foreign article was almost excluded from the market, in my official and friendly intercourse with officers of the navy acquainted with the subject, they regretted that the government pursued so rigid a course towards Mr. Myerle in so often rejecting his hemp, and thought a more liberal policy should be adopted towards him.

Answer to cross-interrogatory 2d. I did not examine the hemp at the navy yard at Charlestown.

Answer to cross-interrogatory 3d. I was not present when the official test was made of the American water-rotted hemp, but I saw the rigging of the United States sloop-of-war *St. Mary's*; the rope looked very smooth and nice, the yarns regular and evenly laid; I tested a great many of the yarns myself, and none of them broke under the official test, and all the yarns went largely over; I was told by the officers of the Washington navy yard that the *St. Mary's* rigging was made of American water-rotted hemp.

Answer to cross-interrogatory 4th. I never saw any samples to compare it with, but I have seen a great deal of Russian hemp, and in 1829 and 1830 I was the sailing master of the *Natchez*; received all the rigging on board and inspected it; was ordered on a survey of the ship's rigging, which had been in use some eight or nine months; it was miscellaneous rigging; some of it was dew-rotted and some of it was Russian hemp; we condemned it as unfit for service; I never saw American water-rotted hemp that would not have lasted much longer; I had two sets of topmast back-stays to the *Erie*, and found them better than any I have ever used; they came from the Charlestown navy yard, and I was informed officially that they were made of American water-rotted hemp; this was in the year 1851 or 1852.

Answer to the general interrogatory. When in St. Louis, in 1854, I had frequent conversations with gentlemen in relation to water-rotted hemp, and heard, through them, that Mr. Myerle had many great difficulties to overcome in doing away with the prejudices against water-rotting hemp.

In my intercourse with the officers of the navy I heard universal testimony in favor of American water-rotted hemp; this is all that I know of importance to the claim in question.

W. D. PORTER.

A. AUSTIN SMITH, *Com'r.*

*Interrogatories propounded to Isaac H. Sturgeon, John Tanier, James Owner, John M. Clarke, Charles D. Loveland, and Henry W. Williams, in the case of David Myerle, with the answers thereto.*

INTERROGATORIES TO ISAAC H. STURGEON.

Interrogatory 1st. What is your name, age, occupation, place of residence for the past year, and are you related to the claimant, or have you any interest in this claim?

Answer to interrogatory 1st. Isaac H. Sturgeon; I am thirty-four years of age; I am assistant treasurer of the United States at St. Louis, and president of the North Missouri railroad; I am not related to the claimant, and have no interest in this claim, either direct or indirect.

Interrogatory 2d. State what you know of the manufacturing operations of David Myerle prior to 1840; whether or not he abandoned them; if so, when and for what reason?

Answer to interrogatory 2d. Letters 2 (1) and 2 (2), made part of this deposition, contain about all the information I can give in answer to the second interrogatory.

*Cross-interrogatories.*

Cross-interrogatory 1st. How long have you known the claimant; at what places has he resided; how long at each place; how many different employments has he had; where did he carry on each of them, and how long, during your acquaintance with him? State the kind of business he was engaged in at the time referred to, and so on in that order, as far back as your knowledge of him extends.

Answer to cross-interrogatory 1st. I have known him since 1838, at Louisville, Washington, and elsewhere; I cannot say how long he lived at each place; I do not know how many different employments he has had. He carried on the manufacture of hemp near Louisville, Kentucky, for a while, and the water-rotting of hemp he was trying to promote in Kentucky, and I think in Missouri; I cannot now say from memory how long. Had I an opportunity, or the time to refresh my recollection, I might remember precisely. He was engaged in the manufacture of cordage and water-rotting hemp at the time referred to. I do not now remember, although I think I heard him say what he had previously been engaged in. I do not know that I can say what Mr. Myerle has been engaged at since my acquaintance with him since 1838, except as stated; he has been prosecuting a claim before Congress, in regard to water-rotting hemp. I do not remember the date that Mr. Myerle left Kentucky; I left Louisville in December, 1845, and have lived in St. Louis since, and have never seen Mr. Myerle since, except at Washington.

Cross-interrogatory 2d. Have you any relations with the claimant, such as to enable you to know the extent of his means; if so, state what property he possessed in 1840, where it was situated, of real estate and its value, and whether encumbered or not; also the extent of his personal effects and liabilities, and the annual profits of his business.

Answer to cross-interrogatory 2d. My relations with claimant are such as stated in the letters marked 2 (1) and 2 (2.) I was the clerk of Myerle's partner, and Stewart was the agent at Louisville for the sale of the cordage made by Myerle, Stewart & Bland. Hardly any transaction was made by them at the time that I did not know of. I am unable to say what property Myerle possessed in 1840 ; he owned an interest of one-third in the rope walk factory of Myerle, Stewart & Bland, and the land they bought of a man by the name of Garr, near Louisville, and the negroes spoken of. I understood Myerle to own some property elsewhere, but don't remember where it was, or its value. The real estate purchased to raise a hemp factory on was encumbered by a mortgage, if I recollect aright, for a part of the purchase money ; how much, can't say. I am unable to state the extent of his personal assets and liabilities, or annual profits of his business.

ISAAC H. STURGEON.

CHARLES H. TILSON,

*Commissioner.*

*Letter 2 (1), referred to in the foregoing deposition of Isaac H. Sturgeon.*

ST. LOUIS, MISSOURI, November 11, 1852.

DEAR SIR: In answer to your letter, I can state, in my opinion, that your pecuniary embarrassments may be attributed wholly to your undertaking to water-rot hemp for the government, which caused you to neglect the rope manufacturing enterprise you had in view and under way, giving great dissatisfaction, as I know, to your partners at Louisville, Kentucky, occasioning them, as well as yourself, as I think, heavy losses. I know that you had the deepest interest in trying to introduce the water-rotting of hemp. It seemed to be almost a mania with you ; it seemed to absorb your whole thoughts almost, and take from the enterprise for manufacturing rope that attention which you should have given them to make them as successful as they otherwise would have been. Then came the rejection of your hemp by the government, which broke you completely down pecuniarily. It is my belief that, if you had never touched the water-rotting of hemp for the government, you would this day be a wealthy man, instead of a man without means. I deeply regret your misfortunes, and know that you must keenly feel your present situation. When I first knew you, you were in easy circumstances—well off—and now, in about fifteen years' time, you are almost brought to want ; especially do I regret this, when I know that your misfortunes were not the result of reckless extravagance, intemperance, or any bad habit, but from a patriotic desire on your part to promote the best interest of your country ; and I shall rejoice to hear of your success in the claim you are prosecuting before Congress, and which I cannot doubt would be instantly allowed if each person could be made to know what many

of your friends know, in relation to your sacrifices for what you believed to be for the interest of your country.

I am, with great respect, your obedient servant and friend,  
ISAAC H. STURGEON.

Mr. DAVID MYERLE.

Refer to the Hon. David R. Atchison, Hon. H. S. Geyer, U. S. Senate; Hon John S. Phelps and Hon. W. P. Hall, House of Representatives.

*Letter 2 (2), referred to in the foregoing deposition of Isaac H. Sturgeon.*

WASHINGTON, March 25, 1852.

DEAR SIR: Your note of the 19th instant was duly received. An answer has been delayed until now, because I have been occupied with other matters, and had not the time to give that reflection about the matter inquired of in your note that was necessary to enable me to refresh my mind about a business that I have scarcely thought about for the last ten or twelve years.

You request me to state the costly order in which the factory was erected in all its branches to give it a capacity for heavy operations; the extent of your operations when you were called by the United States government to test the practicability of water-rotting of American hemp; and my knowledge of the extent of the disastrous losses you sustained in the enterprise by withdrawing from its manufacturing operations, and what was the future prospects of its success in the demand for its manufactured article. My answer to these inquiries must be general, as it is impossible, without seeing the books and having my memory better refreshed, to state particularly in reference to all your inquiries.

In the fall of 1837 I left school, in Jefferson county, Kentucky, and obtained a situation in the wholesale grocery and commission store of Willis Stewart, in Louisville, Kentucky. In the fall of 1838 Willis Stewart, John B. Bland, and yourself, formed a partnership to manufacture cordage, and erected a very costly and extensive factory a few miles below Louisville, at what you afterwards called Dunkirk; you also purchased, if I recollect right, \$16,000 worth of negroes to go into the factory.

I did at one time know pretty well, perhaps exactly, what the negroes and factory cost, but cannot now remember; I think it must have been from fifty to sixty thousand dollars, perhaps more. I was a salesman in the store of Mr. Stewart, was frequently at the factory, purchased and sent hemp to it, &c. It was doing a very heavy business, and it was found that there was ready sale for all that was manufactured. In fact, if I remember right, the demand was greater than the supply, or, in other words, exceeded your ability to supply it. The business certainly bid fair to be a very prosperous one. What the profits made by it were, or what losses you sustained in consequence



of your withdrawing and turning your attention to water-rotting of hemp, would be a difficult matter for any one to estimate. I know, sir, that the business was greatly injured by your withdrawal, and I think, in consequence, embarrassed Messrs. Stewart & Bland very much, from which they have not recovered yet, and I believe you sunk all you were worth, or very nearly so, and may be more. I know that you took great interest in endeavoring to engage persons in water-rotting hemp, and had strong prejudices to overcome in relation to it. I remember Dr. Moore, in Jefferson county, coming to James D. Breckenridge, at the instance of neighbors, to get him to desist from water-rotting hemp, (Breckenridge lived in Jefferson county,) when they got to disputing about the matter of its unhealthiness, which came near resulting in a fight between them. They separated without a personal conflict, but an injunction was obtained by persons living along the stream or branch and its neighborhood against Breckenridge, and for a long time he had to quit the water-rotting of his hemp—how long I do not know. George M. Bibb, now chief clerk of the Attorney General of the United States, was the judge of the court where it was obtained; this was in 1840, and I was at the time entering in the clerk's office in his court, the Louisville chancery court of Kentucky, having left the employment of Mr. Stewart in 1840, as I now remember.

I have the deposition or affidavit of Willis Stewart, dated 15th February, 1845, and, from my general recollections at this time, state that it contains what I believe strictly true. I know him well and intimately; he is a second cousin of mine, and I am satisfied that nothing would induce him to prevaricate or misrepresent anything. He is, in my judgment, as honorable, honest, and truthful a man as can be found anywhere, and his statement may be relied upon. Having answered as far as my memory now serves me, I will say to you, that, if you desire it, as I pass through Louisville, on my way home to St. Louis, I will examine the books in Willis Stewart's possession, and make any further answer to inquiries addressed to me that I can.

With my best wishes for your success and health, I am truly your friend,

ISAAC H. STURGEON.

Mr. DAVID MYERLE.



*John Tanier's deposition.*

My name is John Tanier; my age is a little past sixty; my place of residence for the past year is Philadelphia city; I am not related to the claimant, and have no interest in the claim.

Answer to interrogatory 2d. I know all about his steam patent cordage manufactory that he owned in 1838, at Louisville, Ky.; was his foreman; he had a rope walk, about four hundred yards long and about twenty-five feet in width, one story high, of frame, floored, with a railroad; it extended the whole length; it had patent machinery; it was built in a superior manner for those days—everything

of the best; it was driven by steam—the whole machinery; quite twenty-five horse power. I had at work sixteen slaves and eight or ten white men; we could turn out about three tons of cordage per day; there was an engine and tarring house worked by steam, built of brick, and connected; there was a cordage house, and machine house, and counting house in these, of gravel, and two stories in height; the frame building was about thirty feet front, and of the same depth; there was also a yarn house, of frame, attached to the machine house, of one story; there was also a hatchel house near the centre of the rope walk; that was two stories; that was about twenty feet square. There was also a bobbin house, one story; that was about thirty feet in length and twenty-five feet in breadth. There was a small building, a blacksmith's shop, and a shop where a man worked carpenter's work, each one story high. There were six two-story dwellings in a row, and for the slaves a large frame building, two stories, put up as a boarding house for the white people; they were put up, according to my judgment, in a substantial manner. There was considerable land attached to the premises. The season after it was given up, I was informed there were twenty acres of hemp sown, and about twenty acres of corn. I continued on about a year afterwards as foreman for Bland. There was a farm house also attached to the place. I was with Mr. Myerle at Louisville, at this place, about three years, as his foreman. I do not know much about the value of land, but I do about machinery; I was a mechanic, and had to put the machinery together. That establishment did not cost less than twenty or twenty-five thousand dollars, may be more. The slaves, independent of the above, were worth from one thousand to nine hundred dollars each; there were sixteen of them. I made a good deal of cordage for him; a powerful sight went to New Orleans; some remained at this place; the principal part went to New Orleans. I can't say what the value of the cordage was, nor what amount was taken away; I know that a powerful sight was manufactured. I can't say what amount of interest Myerle sold to Bland & Stewart; know they had a share in it, and I considered them one of my bosses. Mr. Myerle had some individual property—a fine horse and gig; he said he had been offered as much as \$300 or \$500 for the horse. I thought that was a dear price; he had also a buffalo robe which was used with it.

There was also a steam patent cordage manufactory at Wheeling, Virginia—on the island opposite to Wheeling—built by Myerle also. I was foreman for him there also; I came down from Pittsburg to put it in operation. There was also a rope walk there, a little over two hundred yards long, and near about twenty feet wide; that was floored and framed also, with a railroad full length; it had patent machinery in good order, driven by steam, about fifteen horse power; I think, as I understood from the engineer, with capacity to work possibly from twelve to fifteen hundred weight of cordage per day.

There was a brick engine house, the big building front; the cordage house was of frame, two stories. There were machine houses and hatchel house; also at the lower part of the hatchel house a bobbin house; the bobbin house was about thirty by twenty feet. There

was a small brick building off from the rope walk, intended as a counting house, used by a workman and his family to live in ; there were more than four or five acres of land attached to it, I think ; there were four two-story frame buildings built for the intention of being occupied by the workmen ; there were other improvements. I was three years in Wheeling, about the year 1837 ; the property, land, machinery, &c., &c., was worth, I suppose, about twelve thousand dollars. Mr. Myerle had at Pittsburg machinery, finished and unfinished, in preparation for the completion of a rope walk at St. Louis. That was, I think, in the neighborhood of 1840. The machinery, from what I saw, was worth about two thousand dollars. I was in the west, under Mr. Myerle's employ, operating at the places named, about six or seven years ; previously employed by him and C. Tiers, of Philadelphia, seven years. Hemp was worth, in 1838-'39, in the Kentucky market, about eighty dollars per ton ; it cost to manufacture it thirty to forty dollars per ton ; the loss in hatching would be from twelve to fifteen per cent. ; the tar twenty-five per cent. gain. I do not know what he got per ton, but it ought to have netted from fifty to sixty dollars ; the cost of manufacturing, per ton, would be less with slave labor than white : say one-third less. The reason that Mr. Myerle abandoned his business was, that he engaged for the United States in the experiment for water-rotting hemp. I agree with the statements contained in exhibits marked A and B, hereto annexed, which have been read to me substantially, excepting that which refers to some cash advances made by Mr. Myerle, which I know nothing about.

*Cross-examined.—Cross-interrogatories.*

Answer to 1st cross-interrogatory. I have known Mr. Myerle since 1819 ; he resided first at Philadelphia ; then went to Pittsburg ; then to Wheeling ; he sent for me to put his factory there in operation ; then he went to St. Louis, and had machinery made to put up a factory there ; he lived in Philadelphia, I suppose, over thirty years ; after I knew him in 1819, he lived here ten or eleven years ; he lived in Pittsburg about five years ; at Wheeling, hardly two years ; at Louisville he remained three years after I went ; he had been there previously, and at St. Louis, I think, he lived about one year. He never engaged in any other business, as far as I know, except rope-making ; during my acquaintance he carried on the rope-making business at each of the places I have stated ; he has been engaged in the rope-making business as far back as 1819, and no other business, and only ceased at the time he commenced making experiments in hemp for government.

Answer to cross-interrogatory 2d. I did not know the extent of the means, but I know the extent of his business ; he was getting along well ; if he had attended to it he ought to have been rich.

He possessed the establishments I have named in 1840 ; it was situated in Wheeling, Louisville and Pittsburg. I saw some property at Pittsburg which was to go to St. Louis. I can't say what the land was worth ; I do not know if it was encumbered or not. I know of no other personal property, except what I have named in my first examination. I do not know what his liabilities were ; he had no difficulties at that time that I know of ; business was going on well—

discharging all his contracts with his workmen ; he could have manufactured, at an average, three tons per day at the different places, at a profit of \$60 per ton. I know at one time he did do it, before he neglected the establishment for the hemp experiments. I don't know exactly the amount he made in any one year.

JNO. TANIER.

I know of no other matter or thing relative to the claim of Mr. Myerle, except as is hereinbefore stated.

JNO. TANIER.

JAMES R. LUDLOW,  
*Com'r of Court of Claims.*

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A.

*A description of the Washington Steam Patent Cordage Manufactory, built by David Myerle in 1838, three miles below Louisville, Ky., on the Ohio river.*

One rope walk, eleven hundred feet in length, twenty-five feet in width, one story high, framed and floored, with railroad extending its length, with patent machinery built in the most superior and costly order, driven by steam of twenty-five horse power, with capacity to manufacture nearly three tons of cordage per day, or at least six hundred tons per year.

The engine and tarring house, built of brick, twenty-feet in width by forty in length ; machine house, cordage warehouse, and counting house, forty-five front by thirty deep, two stories, (frame ; hatchel house, twenty by thirty, two stories ; yarn house, twenty by thirty, two stories ; bobbin house, fifty by thirty, one story ; house carpenter and blacksmith shops, one story each ; six two-story dwellings (for slaves ;) one large double dwelling ; two story dwelling, (for use of foreman and workmen ;) all of which were frame, built in the most substantial manner, attached thereto twenty acres of land, with sundry valuable articles connected with the manufacturing operations.

The gross value amounting to.....	\$28,650 00
Also sixteen slaves, at \$900.....	14,400 00
Stock of hemp, cordage, &c., at factory and in store at Louisville and New Orleans, October 1, 1839.....	13,000 00

Gross value.....	56,050 00
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*Bland & Stewart, Credit.*

Cash paid D. Myerle at sundry times, on account of purchase of their two-thirds interest in rope walk, (proper,)

November 15, 1838, up to September 18, 1839.....	\$11,263 67
Their two-thirds interest in slaves.....	9,600 00

Their two-thirds interest in stock.....	\$8,666 00
Their two-thirds interest in dwelling.....	2,333 33
	<hr/>
	31,863 66
	<hr/>
	24,186 34

Cr.

D. Myerle, credit, cash advanced by him at sundry times (to firm of Myerle, Stewart & Bland,) from December 3, 1838, to September 24, 1839, including January 14, 1841, to H. T. Sissen \$213 94.....	2,842 46
Individual property belonging to D. Myerle, 3,800 feet of joist lying on Garr's farm.....	90 00
Twenty-six pieces of square timber on Garr's farm, 8,928 feet.....	178 00
One horse, buggy, and buffalo robe, &c.....	400 00
	<hr/>
D. Myerle's interest.....	27,696 80

*Property at Wheeling, Virginia.*—A description of Columbia Steam Patent Cordage Manufactory, built by David Myerle in 1837, on the island opposite Wheeling, Virginia.

One rope walk, six hundred and seventy-five feet long, twenty-five wide, all floored and framed, with railroad its full length, with patent machinery, built in the most costly and superior order, driven by steam, of fifteen horse power, a capacity to manufacture two hundred and fifty tons of cordage per year. Engine house, brick, eighteen by thirty; machine house and hatchel house, thirty by twenty-five, two stories, (frame;) bobbin house forty-five by twenty-five, two stories; a small brick dwelling, one and a half story, with four acres of land attached thereto, with sundry valuable articles connected with the manufactory operations. The gross value of the above property, \$16,500.

*Property at Pittsburg.*—Consisting of machinery, finished and unfinished, in preparation for the intended completion of a rope walk at St. Louis, Missouri, also valuable patterns of the same, \$2,300.

The above description and value is a correct statement of the same.

DAVID MYERLE.

WASHINGTON CITY, February 18, 1856.

## B.

*A statement of the cost of hemp, expense of manufacturing, and profits of one ton of cordage manufactured at the Washington Steam Patent Cordage Factory, Louisville, Kentucky, built by David Myerle in 1838, and continued as the principal owner up to 1841.*

The price of hemp in the market of Kentucky ranged from March, 1838, to July, 1838, \$80 per ton; from August to March, 1839, \$100

per ton; from that period to November, 1839, \$120 per ton. The average cost being about \$95 per ton, making a general average.....	\$110 00
Expenses of labor in manufacturing one ton of hemp, including incidental expenses.....	40 00
Loss on one ton of hemp in hatcheling, 15 per cent., 330 pounds, at 5½ cents .....	17 48
Three barrels of tar, at \$3 50 per barrel.....	10 50
Cost of one ton of cordage.....	<u>177 98</u>
1 ton of hemp, hatched, less 336, 1,904 pounds.	
Gain of tar.....	475
	<u>2,379 p'ds, at 11¼ cts. 267 63</u>

*Charges.*

Freight to New Orleans, 50 cents per 100 p'ds...	\$11 87
Insurance, 1¼ per cent .....	3 33
Commissions on sales, drayage, &c.....	14 38
	<u>29 58</u>
Cost of one ton.....	<u>177 98</u>
	<u>67 56</u>
Net profit.....	<u>60 07</u>
Manufacturing 300 tons of cordage per year—net profit of one ton, \$60 07, is, per annum.....	<u>18,021 00</u>

The charge for manufacturing one ton of hemp into running rigging is rated at the price of white labor (for hire;) having eight spinners, three hatchelers, and five machine and reel tenders of slave labor, which will reduce the cost of manufacturing of more than one-third of the expense.

DAVID MYERLE.

WASHINGTON CITY, *February 20, 1856.*

*Answers of James Owner to the same interrogatories propounded to Isaac H. Sturgeon and others.*

Answer to interrogatory 1st. My name is James Owner; aged fifty-seven years; an agent by occupation; and have resided for the past year in the city of Washington, D. C. I am not related to the claimant, nor have I any interest in his claim.

Answer to interrogatory 2d. I cannot say, from personal observation, what was the extent of David Myerle's manufacturing operations

prior to 1840 and 1841, but have reason to believe they were extensive. He abandoned them some time in the year 1839, for the purpose of devoting his time to the government water-rotting hemp experiment.

JAMES OWNER.

*Cross-interrogatories.*

Answer to cross-interrogatory 1st. I have known David Myerle for twenty years; the first nine years he resided west of the Alleghany mountains; at our first acquaintance, he was engaged in manufacturing cordage, afterwards in the experiment of water-rotting hemp for government. Up to 1845 I was in close correspondence with him at Wheeling, Virginia, Louisville and Lexington, Kentucky, and St. Louis, Missouri. Since 1845 he has resided in Washington, D. C., prosecuting before Congress his claim against government. My first acquaintance with Mr. Myerle was in this city in the early part of the year 1836. Government was at that time building a *rope walk* at Charlestown, Massachusetts; his business here was to endeavor to sell for the use of that establishment his patent improved machinery for the manufacture of cordage. His machinery met the approval of the Secretary of the Navy and the Board of Navy Commissioners. Through their recommendation Congress made a special appropriation for its purchase, which for some cause received a different direction, and was applied for the purchase of other machinery. Mr. Myerle came to Washington again in the early part of the year 1839. This was but a short time after the appointment of the Hon. J. K. Paulding to the Navy Department. I accompanied Mr. Myerle and was present at his first interview with Mr. Paulding, the sole object of which was to get the appropriation of Congress applied as expressed in the bill, viz: for the purchase of his (Mr. Myerle's) machinery, in which he failed, as the department had already purchased or contracted to purchase other machinery. At this time the Secretary proposed to him to undertake the experiment of water-rotting hemp for the use of the navy, with an assurance for protection from loss. Aware of the magnitude of the undertaking, the many obstacles to overcome, and apprehensive of sacrificing his manufacturing interests, Mr. Myerle almost declined having anything to do with it; but said that it was an object of so much importance to the country, especially in time of war, that on his return to Kentucky he would examine and give the subject full consideration, and if it was not entirely impracticable, he thought he had energy and patriotism sufficient to accomplish it. In 1836 Mr. Myerle exhibited to me the drawing of his patent machinery, and the plan of the extensive steam rope factory at Pittsburg, Pennsylvania, at that time. And from correspondence and general rumor, I have every reason to believe that subsequently he had a factory of the same order at Wheeling, Virginia, and one at Louisville, Kentucky, and that he had in progress the machinery for another to be erected at St. Louis, Missouri.

From the close intimacy existing between Mr. Myerle and myself, nearly all his correspondence with the Secretary of the Navy, whilst

in Washington, was written in my presence, and was, with the answers thereto, submitted to my perusal; therefore, I speak understandingly in saying that he was persuaded by the Secretary of the Navy to undertake the experiment of water-rotting hemp from patriotic motives, and embarked in an enterprise which has so far proved disastrous to him.

Answer to cross-interrogatory 2d. Though very intimate with Mr. Myerle since 1836, I have had no opportunity, by personal observation, of knowing the extent of his means—his business and property being in the west, and my residence in Washington city; nor can I state the extent of his personal effects and liabilities, or the annual profits of his business. When he came to Washington, in 1836, he had the appearance of a man of means; his wardrobe was such as any gentleman would be proud to own; he had a room at Brown's hotel, and appeared to be well supplied with money, which was the case in all his visits to this city, up to the year 1842; after the rejection of his hemp, he then appeared in different circumstances; worried and harassed by the rejection of his hemp, his spirits were depressed, and, as a matter of economy, he had to forego the comforts of a first-rate hotel, and take quarters in a second-rate private boarding house. I had full opportunity of learning Mr. Myerle's habits whilst in this city; he was strictly temperate in his living, and always prudent and economical in his expenditures.

Answer to general interrogatory. I saw the report of the official test made of the hemp prepared by Mr. Myerle at the Charlestown rope walk, which exhibited it to bear a greater strain than the best Russian hemp. I also saw samples of hemp prepared by Mr. Myerle, which were very clean, of a good color, and I would judge to be altogether of an excellent quality; and I have reason to believe that these samples met the approval of the Board of Navy Commissioners. This is all that I can now remember relative to Mr. Myerle's claim.

JAMES OWNER.

A. AUSTIN SMITH, *Com'r.*

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*Answers of John M. Clarke to the same interrogatories propounded to Isaac H. Sturgeon and others.*

Answer to interrogatory 1st. My name is John M. Clarke; aged forty-seven years; engaged in the exchange and banking business, and have resided the last five years in the city of Washington. I am not related to the claimant, and have no interest in his claim.

Answer to interrogatory 2d. I know that prior to the year 1841—about the year 1837, I think—Mr. Myerle had a very extensive steam rope walk on Zane's island, opposite to the city of Wheeling; I was at that time a part owner in the island. I was frequently in Mr. Myerle's factory, and, though I am not a judge of machinery and such work, I think that his establishment may have cost \$15,000—and it might have cost much more, perhaps \$20,000. Mr. Myerle



abandoned his works in Wheeling some time subsequent to the year 1837, but for what reason I cannot, of my own knowledge, state; but this I do know, that it was the common rumor and report in Wheeling, at the time, that Mr. Myerle was compelled to give up on account of the failure of the government to fulfil some contract made with him. I was a resident of the city of Wheeling from the year 1830 to the year 1843.

JOHN M. CLARKE.

*Cross-interrogatories.*

Answer to cross-interrogatory 1st. I have known Mr. Myerle about twenty years; was never intimate with him, but only knew him as a business man. In 1837 Mr. Myerle resided in Wheeling, and subsequently to that time I have not known any of his places of residence, never seeing him, except when he was travelling about from place to place, between Pittsburg and Louisville, attending to his business. As to the matter embraced in the remaining clauses of this interrogatory, I know nothing, except what I have stated in my answer to the second interrogatory in chief.

Answer to cross-interrogatory 2d. My relations and acquaintance with Mr. Myerle have not been such as to enable me to know anything of his effects and liabilities.

Answer to general interrogatory. I do not.

JOHN M. CLARKE.

A. AUSTIN SMITH.

*Interrogatories propounded to Charles D. Loveland in relation to Mr. Myerle's manufacturing operations, commencing at the third general interrogatory in his deposition.*

Interrogatory. State what you know of the extent of the manufacturing operations of David Myerle prior to 1840; whether or not he abandoned them; if so, when, and for what reason?

Answer. David Myerle was in possession of a large rope walk in the city of Louisville, Kentucky, an establishment very complete and valuable in its character, doing a large business in that line, which he abandoned to engage in the new project of water-rotting hemp, and he gave up his personal attendance to his manufacturing business in Louisville in 1839, according to the best of my recollection.

*Cross-interrogatories, commencing at the sixth in his deposition.*

Cross-interrogatory 6th—(1st.) How long have you known the claimant, and at what places has he resided; how long at each place; how many different employments has he had; where did he carry on each of them, and how long during your acquaintance with him? State the kind of business he was engaged in at the time referred to, what previous thereto, and so on in that order, as far back as your knowledge of him extends?

Answer to cross-interrogatory 6th—(1st.) I became acquainted with David Myerle, the claimant, in 1838, at Louisville, Kentucky, when and where he was engaged in carrying on his rope factory, and was the reputed owner of a rope factory at Wheeling, Virginia. My acquaintance with Mr. Myerle ceased in 1840, since which I have no personal knowledge of him or his business.

Cross-interrogatory 7th—(2d.) Have your relations with the claimant been such as to enable you to know the extent of his means, the success attending him in business; if so, state what property he possessed in 1840, where it was situated; of real estate and its value, and whether encumbered or not; also the extent of his personal effects and liabilities, and the annual profit of his business?

Answer to cross-interrogatory 7th—(2d.) At present I have not—not since 1839. He was then doing a large and profitable business, and esteemed wealthy, owning an unencumbered and valuable property in Louisville, Kentucky, on which his factory was situated; also, rumor said, was the owner of a fine property in the city of St. Louis; also a property in Wheeling, Virginia; don't know about his personal effects or liabilities; have no definite knowledge of his annual profits from his business; and further the deponent saith not.

CHA'S D. LOVELAND.

N. J. ROCKWELL, *Commissioner*.

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*Interrogatories propounded to Henry W. Williams, in the case of D. Myerle, with the answers thereto.*

Interrogatory 1st. What is your name, age, occupation, place of residence for the past year? Have you any interest, direct or indirect, in the claim which is the subject of inquiry, and in what degree are you related to the claimant?

Answer to interrogatory 1st. Henry W. Williams; aged forty years; occupation, attorney at law; have lived in St. Louis for the last year. I have no interest in this claim, and am in no way related to the claimant.

Interrogatory 2d. Have you examined a copy of the record hereto annexed, marked "A"?

Answer to interrogatory 2d. I have.

Interrogatory 3. State what the value of the property mentioned in said record was in 1840.

Answer to interrogatory 3d. I find, by examining the records, that the property adjoining the lots mentioned in the exhibit A sold at that time for two hundred dollars an acre. The property is of about the same character.

Interrogatory 4th. What was property sold for adjoining this in 1843?

Answer to interrogatory 4th. Three hundred dollars an acre. In 1848 property sold for two hundred and fifty dollars an acre in the same subdivision, but not so well situated. At the same rate the property in question would be worth from five to six hundred dollars an acre in 1848.

Interrogatory 5th. What would the property mentioned in the exhibit "A" sell for now?

Answer to interrogatory 5th. The land described in said exhibit would sell now for three thousand dollars an acre.

Interrogatory 6th. What means have you of knowing the value of this property?

Answer to interrogatory 6th. I am engaged, and have been for the last twelve years, in the examination of titles to real estate. I have also a portion of the time been engaged in buying and selling property; have also made assessments of property for the city of St. Louis, and have had my attention turned particularly to the value of property for the last twelve years.

HENRY W. WILLIAMS.

CHARLES H. TILSON, *Com'r.*

NOTE.—The copy of the record of the county court of St. Louis, of the sale of property, annexed to the deposition, and referred to in interrogatory 2d, is omitted.

A.

UNITED STATES GOVERNMENT,

*To David Myerle, Dr.*

Contract for 200 tons American water-rotted hemp, at  
\$300 per ton, dated April 12, 1840.

That contract was cancelled before any deliveries were  
made, and renewed March 3, 1841, for 500 tons, at  
\$300 per ton..... \$150,000 00

(See letter of Hon. Ballard Preston, late Secretary of the  
Navy, to the House of Representatives, Ex. Doc. No.  
36, 31st Congress, 1st session. Also depositions of  
Hon. James K. Paulding, William D. Porter, United  
States navy, and William Cabin, foreman United  
States rope walk.)

About 20 tons delivered at the navy yard at Charles-  
town, Massachusetts, improperly rejected, March 15,  
1841.

About 60 tons in readiness, and preparing for shipment  
at that time.

Delivered at Charlestown navy yard, in 1843, 71 tons  
14 cwt. 2 qrs. 6 lbs., "*a perfect article*," which was  
also rejected.

Seeing that the rejection of my hemp was predetermined,  
a balance of 50 tons then on hand was shipped to  
New York and to Liverpool, England.

Cost of hemp delivered at Charlestown, including all  
charges, was \$170 per ton.

500 tons of hemp, at \$170 per ton..... 85,000 00

Net profit on contract..... 65,000 00

(See depositions of J. W. Roberts, Israel Lombard, Benjamin Sewall, Thomas E. Courtenay, Henry Van Pheel, Jacob Hall, and William Cabin.)	
Net profit on contract for 500 tons.....	\$65,000 00
Loss of property at Louisville, Kentucky..	27,696 00
(See depositions of Isaac H. Sturgeon, John Tanier, James Owner, and Charles D. Loveland.)	
Loss of property at Wheeling, Virginia...	16,500 00
(See depositions of John Tanier, J. M. Clarke, Charles D. Loveland, and James Owner.)	
Loss of property at Pittsburg, Pa.....	2,300 00
(See depositions of John Tanier and James Owner.)	
Loss of property at St. Louis, Missouri....	6,000 00
(See deposition of H. W. Williams; also John Tanier's former deposition, hereunto appended.)	
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Direct losses on contract and property, with interest from 1841, which ought to be allowed.....	\$117,496 00
Loss in manufacturing interest at Louisville, Kentucky, net annual profit, \$18,015.	
(See depositions of Isaac H. Sturgeon, John Tanier, Charles D. Loveland, and James Owner.)	
Allowing for changes of time and contingencies, reduce the average to \$12,000 per year, one-third of which is \$4,000.	
\$4,000 per year, for 17 years, 1839 to 1856.....	68,000 00
Loss in manufacturing interest at Wheeling, Va., at a low average, of \$2,000 per year, for 17 years, 1839 to 1856.....	
(See depositions of J. M. Clarke, John Tanier, and James Owner.)	34,000 00
Expenses attending the prosecution of my claim, travelling to and fro between Washington city and the west, from 1842 to 1846.....	
	2,350 00
Expenses at Washington city from 1847 to 1856, nine years, at \$500 per year.....	
	4,500 00
Outstanding liabilities thrown on me by the rejection of my hemp.....	
	21,702 00
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Consequent losses.....	130,552 00
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• Aggregate of direct and consequent losses.....	248,048 00

Expenses incurred in procuring testimony ordered to be taken by Court of Claims..	\$287 40
Copying and printing.....	95 00

*A statement of the cost of one ton of hemp at Louisville, Kentucky, and the expense of manufacturing it into cordage; transportation to and commission on sale at New Orleans, with the profit arising therefrom, in the years 1838 and 1839.*

Average price of hemp per ton.....	\$110 00	
Expense of manufacturing, including labor, tar, (3 barrels,) oil, tallow, &c.....	50 50	
Freight to New Orleans, 50 cents per 100 lbs.....	11 89	
Insurance, $1\frac{1}{4}$ per cent.....	3 33	
Commission on sale, 5 per cent.....	13 38	
Loss from shives, dust, &c., 15 per cent., 336 lbs., at $5\frac{1}{2}$ cents.....	17 48	
		\$206 58
One ton of hemp, less 336 lbs., loss from hatcheling, made into cordage for run- ning rigging, is..... 1,904 lbs.		
Gain from tar, 25 per cent..... 475		
	2,379 lbs., at $11\frac{1}{4}$ c.....	267 63
Net profit per ton.....		61 05
Manufacturing at the rate of 300 tons per year, is \$18,315. (See depositions of John Tanier and Isaac H. Sturgeon.)		

DISTRICT OF SOUTHWARK,

*County of Philadelphia, to wit:*

John Tanier, of the district of Southwark, county of Philadelphia, foreman for Wise & Thomas, rope manufacturers, appeared before me this day, the 24th day of December, 1852, made oath and declared, that in the year 1836 he was employed to take charge of the extensive steam rope factory built by David Myerle at Pittsburg, in the capacity of foreman, for the manufacturing of cordage; that subsequent to the above engagement, in the year 1837, he was also engaged in the same capacity to take charge of the factory of the same order built and owned by him at Wheeling, Virginia; and that, also, in the spring of 1839 he was called and engaged by Mr. Myerle to take charge of the extensive rope factory built by him at Louisville, Kentucky. Shortly after that Mr. Myerle had left it, for the purpose of entering on the experiments for water-rotting of hemp for the United

States government. He also declares that at the time of Mr. Myerle's attention to the above business the factory was doing an extensive and profitable business, with an increased demand, manufacturing nearly three tons of cordage per day; but subsequent to Mr. Myerle's leaving it, in the year 1839, for the above experiments, the business was, in his belief, improperly managed for the want of his attention, and the whole concern went to ruin.

He also declares that the factory at Louisville was of the most extensive capacity, the machinery of the most costly order, (built at Pittsburg,) all running by steam power, and there was every prospect, whilst Mr. Myerle was engaged in the superintendence of the business, of realizing an immense fortune in the manufactured article, from the character of the cordage in the New Orleans market, with the demand and the prices it commanded.

He also declares that he was preparing for the completion of an extensive factory, of the same order, at St. Louis; the machinery was in preparation to its completion, and he saw a portion of the machinery finished. He also suggested an improvement, by having two railroads for the machinery to operate on; and he (Mr. Myerle) also directed him to instruct his son in the knowledge of rope-making, that he or myself should take charge of it as foreman.

He had been in the employ of Mr. Myerle for upwards of twelve years, and found him invariably prompt and honorable in all his engagements, kind and interested in the welfare of his people under his employ, provided they did their duty.

JOHN TANIER.

Sworn and subscribed to before me, this day and year aforesaid.

DAVID L. DONALDSON, [L. s.]  
Alderman.

I certify that I have been acquainted with the aforesaid John Tanier for many years, and have every reason to believe the said statement to be just and true, which he has sworn to before me.

DAVID L. DONALDSON,  
Alderman.

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*An extract of a letter from Vincent Brown, formerly of Pittsburg,  
August 2, 1848.*

"For many years I had heavy dealings with you in constructing the machinery for various rope manufactories built by you at Pittsburg, Wheeling, Va., and Louisville, Ky., and in all my dealings with you I found you prompt and honorable in your engagements.

"The machinery for these establishments was built at a great cost and superior arrangement, especially the one at Louisville, which, according to my judgment, was calculated to manufacture a vast amount of cordage annually, and, with proper attention, would have rendered a great return for the capital invested.

"You were also making arrangements in the fall of 1839 to proceed with the building of an extensive factory of the same order at St. Louis. A large portion of the machinery constructed by me was in readiness, when you informed me that you had entered into some arrangement with the United States government relative to the hemp business, and that you could not proceed. I can cheerfully bear testimony to your deportment as an honorable man on all occasions."

## B.

Contract entered into April 12th, 1840, for 200 tons American water-rotted hemp, at \$300 per ton.

Cancelled before any deliveries were made, and renewed March 3, 1841, for 500 tons, at \$300 per ton..... \$150,000 00

That contract was annulled January 3, 1844.—(See letter of Hon. Ballard Preston, late Secretary of the Navy, to the House of Representatives, Ex. Doc. No. 36, 31st Congress, 1st session.)

First delivery of hemp made March 15, 1841, about 20 tons. This delivery was improperly rejected for want of cleanness, *but the strength exceeded the best Russia hemp.*

(See depositions of Hon. James K. Paulding, William Cabin, foreman of the United States rope walk, and William D. Porter, United States navy.)

Second, third, and fourth deliveries were made in 1843, upwards of 71 tons, also rejected.

Those deliveries "*were a perfect article.*"—(See depositions of Benjamin Sewall, Israel Lombard, J. W. Roberts, and Thomas E. Courtenay.)

Cost of hemp delivered at Charlestown, per ton, as follows, viz:

One ton of hatched hemp, from first hands...	\$121 00
Loss in the difference between the value of tow and the first cost of hemp, including loss on shives .....	12 00
Freight to Charlestown.....	20 00
Commissions, 5 per cent.....	7 95
Insurance, 2½ per cent.....	4 09
	<hr/>
	165 04
Allow for contingencies.....	4 96
	<hr/>
Making cost per ton .....	170 00
	<hr/>
500 tons of hemp, at \$170 per ton.....	85,000 00
	<hr/>
Net profit on contract.....	65,000 00

This profit of \$65,000 could have been realized in 1841, 1842, and 1843, the hemp being all engaged from the crop of 1841. The prejudices against water-rotting having been removed by my efforts of 1839 and 1840, a number of hemp growers, under my instructions, were preparing their crops by that process, and would have produced double the quantity necessary to fill the contract; but the rejection threw them all aback and caused a suspension of all operations. Devoting, necessarily, so much of my time to this important national work, my regular business was to the same extent neglected; my manufacturing interests at Wheeling and Louisville languished and became profitless; and my property, which, at the time I entered on the contract, was productive and valuable, was sacrificed to meet liabilities thrown on me by the improper rejection of my hemp.

See depositions of Henry Wallace, Charles B. Lewis, J. W. Roberts, James Story, T. E. Courtenay, Hon. James K. Paulding, Jacob Hall, William D. Porter, United States navy, Israel Lombard, and Benj. Sewall.

Profit on contract .....	\$65,000 00
Loss of property at Louisville, Ky.....	27,696 00
Loss of property at Wheeling, Va.....	16,500 00
Loss of property at Pittsburgh, Pa.....	2,300 00
Loss of property at St. Louis, Mo.....	6,000 00

Direct losses, with interest from 1841..... \$117,496 00

My property at St. Louis consisted entirely of real estate, sold under a foreclosure of mortgage (which I had ample provision to meet when I entered on the hemp experiment) for the sum of \$1,020, worth at the time \$3,000; in 1843 it was worth near \$5,000; in 1848, \$10,000; and at this time is worth \$50,000. I estimate it at its average value from the time of sale to 1848, which is \$6,000.

See deposition of H. W. Williams.

Loss in manufacturing interest at Louisville, Ky.....	\$68,000 00
Loss in manufacturing interest at Wheeling, Va.....	34,000 00
Expenses attending the prosecution of my claim before Congress, 12 years.....	6,850 00
Outstanding liabilities thrown on me by rejection of my hemp.....	21,702 00

Consequent losses..... 130,552 00

Aggregate of direct and consequent losses..... 248,048 00

Expenses incurred in procuring testimony ordered to be taken by Court of Claims..... 287 40

Copying and printing..... 95 00



WASHINGTON, *February 22, 1850.*

As an additional evidence of the importance of the enterprise in which I was engaged, and the immediate consequences to the naval resources of the country, I subjoin an official report from Mr. Whitmore, foreman of the naval rope-walk at Charlestown, Massachusetts, showing the strength and quality of the first water-rotted hemp forwarded from Kentucky in 1840. It will appear from that report that my hemp was actually *superior to the best Russia hemp*. I will only add that this and subsequent shipments, amounting in all to about 200 tons, was rejected by the agents of the Navy Department, was thrown on my hands, and was sold at great loss in Europe and this country, and brought serious and irretrievable embarrassments upon me.—(See my pamphlet, Lombard & Whitmore, pages 28 and 29, Sewall & Day, page 29, W. W. Thompson, page 24.)

The following certificate from the manufacturer who purchased a large portion of the rejected hemp will show its character: "The quantity of hemp which I purchased from Messrs. Lombard & Whitmore, water-rotted, I found a very perfect article, very clean, free from tow, and strong fibre. This hemp, I understood from them, was a parcel they received from you for government, but they declined receiving it, and was therefore obliged to offer and sell it to others."—B. Sewall, Boston.

I also made a shipment to Liverpool, which sold for £1 10s. per ton higher than Russia hemp in that market.—(See P. J. Francia's letter, filed with my papers.) A manufacturer who purchased a portion of the same hemp in this country stated that it was too good for ordinary purposes, and that he was reserving it for some finer qualities of cordage.

Such has been the advances made in the western country, since that period, in the water-rotting of hemp, that the navy can now procure any amount of the article, of a better quality than the imported, and at a lower price.

DAVID MYERLE.

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*The first official report made on American water-rotted hemp.*

NAVY YARD, CHARLESTOWN, *November 22, 1840.*

SIR: In compliance with your order of November 2, I have examined and experimented upon the different samples of American hemp received from the board of navy commissioners, and have compared them with the best Riga Rein and St. Petersburg hemp. I would respectfully submit the following results of the experiments:

*The average strength of three trials.*—Sample No. 1: tow extracted 14 per cent.; sustained a weight, compared with a rope of  $1\frac{1}{2}$  inches, untarred, 5,040 pounds; tarred, 5,502 pounds.

Sample No. 2: tow extracted 25 per cent.; sustained a weight, compared with a rope  $1\frac{1}{2}$  inches, untarred, 4,284 pounds; tarred, 4,431 pounds.

Sample No. 3 : tow extracted 22 per cent. ; sustained a weight, compared with a rope  $1\frac{1}{2}$  inches, untarred, 5,922 pounds ; tarred, 5,481 pounds.

Riga Rein : tow extracted 19 per cent. ; sustained a weight, compared as above, untarred, 4,746 pounds ; tarred, 4,893 pounds.

St. Petersburg : clean tow extracted 22 per cent. ; sustained a weight as above, untarred, 4,011 pounds ; tarred, 3,948 pounds.

I will remark that the samples, No. 1 and No. 3 of the American hemp, were of extra quality and great strength, and much better cleaned than any I ever seen before. Sample No. 2 was of good quality, but not equal to the others. I should judge it to be a fair sample of American hemp generally. American hemp is brought into the market packed in bales, a part of which is good, and a part of inferior quality, no attention having been paid to selecting the good from the bad. The Russia hemp is inspected and separated by a regular inspector into three qualities—the first quality is called the clean hemp, the second out shot, the third half clean. These same qualities are found in the American, which should be inspected and separated in a similar manner.

Subject the hemp of Mr. Myerle to inspection, I have no doubt, judging from the samples he has furnished, that a large proportion of it will be found of very superior quality, stronger than any imported hemp, and nearly as well cleaned.

The objections to rope made of American hemp are, that it decays sooner than Russia hemp rope ; there is a decayed glutinous substance attached to the fibre, which prevents the tar from penetrating it properly, and also has a tendency to rot the rope ; these samples I found to be very free from this substance. The process of water-rotting, I should think, would work this substance off and remove the evil in a great measure. I am informed that American hemp is generally dew-rotted.

I am, respectfully, your obedient servant,

STEPHEN WHITMORE, Jr.,  
*Rope Maker.*

To Com. JOHN DOWNS,  
*Commandant Boston Navy Yard.*

P. S. The above hemp was tested in separate yarns. If they had been thrown together into the form of a rope, their strength would have been increased. The navy standard for a rope of  $1\frac{1}{2}$  inches is 4,200 pounds.  
D. M.

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IN THE COURT OF CLAIMS.

ON THE PETITION OF DAVID MYERLE.

*Brief of United States Solicitor.*

The claim is, in substance, that the petitioner being in Washington during the administration of the Navy Department by Mr. Paulding

he fell into conversation with Mr. P. on the subject of supplying the department with water-rotted hemp of American growth; that Paulding was very much moved on the subject, considering it essential to our independence; and thinking Myerle a proper instrument to work out this patriotic purpose, although an entire stranger to him, he besought him to undertake the enterprise. Myerle was aware of the difficulties attending it, and foresaw the ruin of his business, then very lucrative; but, quickened by the appeals made to his patriotism by the Secretary, and relying also on the assurance that the department would hold him harmless and ultimately reward him liberally, he abandoned his business to engage in the business of supplying the navy with water-rotted hemp of American growth.

To this end he had some pools made in Kentucky, and my entreaties succeeded in inducing the neighbors to forbear and await the results of the experiments on the health of those engaged in preparing the hemp, and the result was that it became manifest to them that the pre-existing idea that the business was an unhealthy occupation was abandoned. He had thus succeeded in securing the co-operation of the farmers in the production of the article, but the inspectors at the navy yard at Charleston were not satisfied with the article which he offered for the use of the navy, and rejected it. This rejection, he says, was in violation of his contract, although by the express language of the written contract the article was to undergo this ordeal before he was to be paid for it. Nevertheless he insists, against the very terms of his written agreement—which was that the article should be tested by the judgment of inspectors to be appointed by the navy board or commandant of the yard at Charleston, and should not be received unless it was equal in every way to the best Riga Rien hemp—that it should have been received and paid for, the report of the officers to the contrary notwithstanding; and this because the object of the contract was not to furnish any particular amount of hemp to supply the existing necessities, but to start a system of supplies to operate in future; and having succeeded partially with the particular article offered, the inspecting officers, and all concerned, violated their duty in refusing to receive and pay for it. And Mr. Paulding swears that if he had continued in office he would certainly have received the hemp for the United States, although it had but one quality to that of the other, and which it was to be tested by.

The compensation claimed is for the *loss of credit* which ensued from the rejection of the hemp, and for the losses which *this loss of credit* brought on him, viz., the losses arising from the forced sale of his property, and the loss of profits on the contract for five hundred tons of hemp, which the loss of credit disabled him from fulfilling, and finally the loss of his services and labor for five years.

It must be manifest to every legal mind, at a glance, that there is no merit, judicially speaking, in this claim. The consideration on which it professedly depends are of a character which may appeal to the feelings of a citizen, but are such as courts have no knowledge of, and no rule or scale to admeasure.

Thus the patriotism of both the Secretary and the claimant, spoken of in the testimony, is honorable to both of them, but it is foreign to

the subjects with which courts have to deal ; and when it is presented as a basis for judicial action, and made the ground for a court to disregard the terms of a written contract, it becomes ludicrous. Judges and lawyers are, as men and citizens, not insensible to patriotism, but it does not require the intellectual training of a lawyer to perceive that there can be no admixture of sentiment and bargains.

If a man wants the rewards of patriotism he must apply to the public ; if the benefit of his contracts or bargains, let him appeal to the court.

We have here no jurisdiction except over what relate to contracts ; and, in the eye of this tribunal, it is of no moment whether the contract in question was wholly induced by patriotic considerations, or whether the parties to it were distinguished patriots or mere adventurers and jobbers.

Nor is it of any moment to consider whether the contract proved by Mr. Paulding varies in any respect from the written contracts in evidence ; because, by the well-settled principle, such proof is inadmissible.

If it were important, it could easily be shown that the talk with Mr. Paulding which preceded the contract, and which is supposed to be so material to the case, is, independent of the principle that it is inadmissible by proof of such talk to vary the written contract, wholly immaterial.

Most of it relates to his anxieties to get something done towards water-rotting hemp, and the difficulties in the way of accomplishment of that object arising from confirmed popular prejudice. Then comes the proposition to Myerle to go on this mission—his reluctance—his acquiescence.

But after all, it comes out that the written contract was entered into for the purpose of carrying out the objects discussed and desired ; and though entered upon without the usual requirement of advertisement and security, it expressed the business relations of the government to the contractor in the experiment undertaken to settle this great question, and it was supposed, "would afford him a liberal profit and sufficient time to make deliveries." It is true that Mr. P. says he promised Myerle the department should secure him against loss ultimately, as an inducement in addition to the liberal price for the article stipulated for in the contract. But this, in the sense here contended for, is expressly contradicted by the contract as altogether improbable in itself.

We have two written contracts, one dated March 12, 1840, in which Myerle "agrees to deliver and furnish, at his own risk and expense, at the navy yard, Charlestown, Mass., on or before March 1, 1841, 200 tons of water-rotted hemp, of growth of the United States, to be well cleaned and dressed, free from all defects and damage, and fully equal in strength, and in all respects, to the best imported Riga Rein hemp, and shall be subjected to inspection and test, to be made by persons to be appointed by the navy commissioners, or by the commandant of the navy yard aforesaid ; and the said hemp shall be entirely to their satisfaction, otherwise it is not to be received by the United States." On the part of the United States, it is agreed "that for the 200 tons American water-rotted hemp aforesaid, furnished and

delivered, inspected and tested as aforesaid, approved and received, there shall be paid at the rate of \$300 per ton." "No other charge to be admitted nor allowances to be made by the United States for or on account of this contract."

The second contract, dated March 3, 1841, extends the quantity of hemp contracted for to 500 tons, and the time for its delivery till December 1, 1842, and contains the provisions above quoted as to inspection, test, &c., and that no allowance is to be made over and above the price to be paid on the acceptance of the hemp.

It therefore appears positively from these contracts that no other allowance should be made on account of the contract but the price stipulated.

And it is absurd to suppose that any other terms than these were agreed on. Myerle is an utter stranger to the Secretary and to the navy board, and goes before them with no recommendation either for character or ability; and yet we are asked to believe that the department was put at his disposal, and bound to pay all losses which he should incur in attempting to carry out a project.

The meaning of the Secretary is, evidently, that any loss which he should incur in fulfilling that contract would be made good to him in future; that he would see to it that ultimately he would be the better for complying with the Secretary's wishes. This implies nothing contradictory of the contract; and so far from contemplating any relaxation of its terms, his promises are expressly to make good losses arising from fulfilling it, not those arising from failing to fulfil it. Every claim here is for losses arising from such a failure.

But it is said the hemp ought not to have been rejected—that there was no failure. But the proof of failure is positive, and not a tittle of evidence is given to discredit it. The failure is, in fact, admitted, not only in the actual rejection of the hemp offered by the inspectors agreed upon in the contract, but it is admitted that the hemp was not equal in quality to the standard by which they were to test it, and therefore that they judged properly in rejecting it.

It is, however, attempted to be proved that they acted corruptly, or that some one acted corruptly, in rejecting it, notwithstanding this rejection, by proving the assertion of Com. Nicholson to that effect. The offer of such testimony is almost disrespectful to the court. It shows that the court is expected to violate all the settled rules of law in respect to testimony.

But the official action of Com. Nicholson in approving the report of Caban of 25th July, 1843, and his own official report of 15th May, 1844, show that if Mr. Porter, in whose testimony this fact is expected to be shown, is not absolutely in error in his statement, the weight of testimony is at least against any such imputation ever having been cast on the action of the board of officers who inspected the hemp at Charleston, or the navy board. On the other hand, it is shown affirmatively by the official report of the inspectors, and by this and the testimony of Caban, that the inspection was perfectly fair. Mr. Myerle's agent at Boston, Mr. Lombard, who delivered the hemp, was not present at the time the inspection and trial of the hemp was made. He did not know anything of the hemp offered in 1841. His

knowledge of the transaction, and indeed of anything about hemp, began in 1842.

Mr. Paulding says, indeed, that if he had continued in office he would have had the hemp accepted, the report of the inspectors against its quality to the contrary notwithstanding. Without disrespect to Mr. P., it may be said that his opinion of what ought to have been done by his successor, in the discharge of his duty, is not entitled to any weight against their official action. The law will presume that they are quite as well qualified as he was to the discharge of their duties, both in capacity and in a sense of what is due to the government and those contracting with it. There is too obvious a justification for the action of the department under his successor to justify any imputation from him or others on account of it.

The agreement of Mr. P. for indemnity for loss, supposing that he had authority to make such a contract, was predicated on the performance of contract which was not done.

It may be observed, moreover, that Mr. P. certainly had no authority to make any such contract: there was no law by which he was authorized to experiment in water-rotting hemp, and to agree to indemnify those employed on his project for losses. I do not deny that the object was a proper one, but it is not within the province of executive officers to undertake great national objects, except under authority of the legislature.

He had authority only to carry out existing laws; there was no law which looked to the substitution of American for Russian hemp. The obvious meaning of the existing laws requiring advertisements is, that the executive officers shall buy of the lowest bidder; but he argues in his deposition that he was not bound to accept the lowest bid, because he could not put to hazard the ships and crews by taking an inferior article, &c. But this is an evasion. He had not, under color of getting superior articles made, and the safety of the ships, the right to disregard the laws of Congress for another object altogether, whether of national importance or not. It is for Congress to consider of the propriety of undertaking such objects; and an executive officer cannot, with any regard to his duties, abuse the trust committed to him, and use the money put under his control for such objects for other purposes. The end, however good, does not justify the means; and the example is not less dangerous when set by a man of the character of Mr. Paulding. It is obvious that Mr. Paulding agreed to give Myerle \$300 per ton, instead of \$234, the price of the best Russian, in order to introduce the water-rotted hemp. This does not, I agree, invalidate the written contract with Myerle, because that was within the powers of the Secretary, though a perversion of them; but an agreement for further indemnity was not within the powers of the Secretary. The law authorizing the purchase of hemp would sanction the written contract so far as to make it obligatory on the government; but there was no law to authorize indemnity for any experiments in the processes of this production. Of this Myerle was bound to take notice; and the purpose for which it was undertaken, whether public or private, is immaterial.

*Measure of damages.*

Let us pass now to the character of the damages claimed, and the evidence on which it is founded.

If it were established that the hemp was improperly rejected, the measure of damage would be the amount of difference between the sum agreed on and that for which the hemp was sold, or the market price of such hemp at the time when the hemp was offered.—(See Sedgwick, pp. 84, 85.) But we have nothing of this sort. There is no evidence of the offer of any but 20 tons of hemp in 1841, and 70 tons in 1842. We have no account of the purchase of any particular quantity of hemp, or any particular expenditure for hemp on account of the United States. Thompson's clerk, Roberts, speaks of \$8,768 having been expended for water-rotted hemp; but this is not said to have been Myerle's money; nor is it said the hemp was sent to the navy yard. According to Mr. W. Thompson, (see his letter,) it went to Boston, New York, and Europe. There is evidence only of but a trifling amount of hemp offered and rejected. Instead of this, we have a claim *for loss of credit* on account of the rejection, and loss of profits on the contract, consequent on the disability thereby created; loss of property sacrificed by reason of not having the means he ought to have had; and loss of time in and about the same.

It would scarcely be respectful to the court to present authorities to convince it that such consequences are too remote to be considered in the assessment of damages, for the breach of contract complained of, even if the contract be construed as claimed by the claimant's counsel as a guarantee against loss. In this sense, even, nothing but legitimate damages could be recovered.

But does the evidence prove that any of the losses were imputable to the rejection of the hemp offered? The cause is wholly inadequate to produce such results, according to any reasoning.

But not only can it not be shown by any reasoning that the results flowed from the imputed cause, but we are able to show the contrary by Myerle's own testimony—that of H. W. Williams, showing that his property in St. Louis was sacrificed before he had any connexion with the government—(the record, in the printed deposition, is omitted no doubt because it shows this;) his own letter, dated February, 1841, before the hemp was rejected, showing that he was already in pecuniary difficulties. It appears, from this letter, that he had consolidated his property in Louisville, had sold two-thirds of it, and the purchasers failed to pay; had sold out at Pittsburg, and lost the money; and that he had a mortgage of \$5,000 on the balance, about which the holder was troubling him.

He has scoured the country for testimony, and has had the privilege of showing the particulars of his losses, and has failed utterly to do so. Was he not bound to show the particulars?—as that at the date of such contract he was owner of such and such property—how it was encumbered, and what disposition has been made of it. There is no proof, on the contrary, that he was the owner of a dollar; and the sketches which we have of his career, as given by the foreman, Tanier, and all

the information which we have concerning him, are strongly confirmatory of this, and creates irresistibly the impression on the mind that he was a visionary person, changing his residence from place to place—first living in Philadelphia, then in Pittsburg, then in Wheeling, then in Louisville, then in St. Louis—now experimenting in steam machinery, establishing rope walks, residing in all the cities of the Mississippi valley and abandoning them, and finally undertaking, at Mr. Paulding's instance, to procure water-rotted hemp, without having ever in his life had anything to do with the process. It appears, incidentally indeed, in these papers, that many other parties had lost money by their connexion with Myerle's enterprise; but I declare it to be my conviction, after a careful study of this testimony and reading all the papers filed before Congress during the long time in which it has been importuned with this claim, that there is no evidence that Myerle has lost a dollar, directly or indirectly, by the enterprise.

It appears, by Hall's testimony, that he gave but \$6 to \$8 per 112 pounds, say \$7 per 112 pounds, equal to \$140 per ton. Hall sold his own for \$196 per ton in the market. It does not appear what that sent to Boston by Thompson was sold for, although the person who sold and who bought it was sworn.

I think it proper to add, that the testimony proves that Myerle was instrumental in removing prejudices existing in the west against water-rotting hemp, from the belief that it was an unhealthy occupation. This service has been regarded by many persons as the foundation of his claim, and it may entitle him to a bounty. Whatever services he may have rendered in that matter, however, were incidental merely to his efforts to perform a contract for furnishing a certain quantity of hemp. But the contract with him was not to pay for enlightening the public mind, but for hemp; and however important such service may be, as it was not his contract, he does not thereby entitle himself to remuneration under the contract. If there is any compensation to be given for it—and I shall not say there ought to be none—it is clearly not competent for this court to measure it; we have no means of knowing or measuring the value of the enlightenment effected through Myerle's agency; we cannot find the *quantum meruit* for information and knowledge communicated to the public by any scales used in courts, and ought to leave the rewards of such service to other hands.

M. BLAIR.

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DAVID MYERLE vs. THE UNITED STATES.

Chief Justice GILCHRIST delivered the opinion of the court.

In this case it appears, that on the 12th day of March, 1840, the claimant made a contract in writing with the board of navy commissioners that he would deliver, at his own risk and expense, at the navy yard at Charlestown, Massachusetts, on or before the first day of March, 1841, two hundred tons of water-rotted hemp, which should be of the growth of the United States, should be well cleaned and dressed, free from all defects and damage, and fully equal in strength



and in all respects to best imported Riga Rein hemp, and should be subjected to inspection and tests, to be made by persons to be appointed by the navy commissioners, or by the commandant of the navy yard aforesaid, and should be entirely to their satisfaction; otherwise it was not to be received by the United States. The contract provided that he should be paid for the hemp at the rate of three hundred dollars per ton.

On the 3d day of March, 1841, the claimant made another contract with the board of navy commissioners for the delivery of five hundred tons of American water-rotted hemp, which quantity was to include the two hundred tons mentioned in the first contract, on or before the first day of December, 1842. The qualities of the hemp were to be, in substance, those mentioned in the first contract, and he was to be paid for it at the rate of three hundred dollars per ton.

It is not contended by the claimant that these contracts have been performed on his part, or that he has any cause of action against the United States arising out of any failure on their part to perform the stipulations in the contract. The claimant alleges that the liability of the United States depends on a verbal contract, made between himself and the Secretary of the Navy (Mr. Paulding) in the year 1839. The deposition of Mr. Paulding has been taken in this case by the claimant. Mr. Paulding states, that while he was at the head of the Navy Department the claimant called on him with reference to certain improvements he had made in the machinery for manufacturing cordage; that perceiving the claimant to be an intelligent and enterprising man, he suggested to him that it might be advantageous to him to engage in the business of water-rotting hemp, and that the claimant stated, that although he did not believe the occupation to be dangerous to those engaged in it, yet, being then engaged in a profitable business, he was unwilling to relinquish it for one which he foresaw would be attended with almost insurmountable obstacles, and a failure in which would involve him in great pecuniary loss. The Secretary then assured the claimant that the department would take care that he should be recompensed for any loss he might ultimately sustain in consequence of a failure of the experiment; and he states that he made this promise solely in the hope of being instrumental in conferring a great benefit on his country, and under a full conviction that if he remained in office he would redeem his pledge, without transcending his powers or violating any existing law. He says further, that the claimant being influenced, as he believes, by these assurances, as well as by motives of patriotism, acceded to his proposition, and a contract was entered into with him for two hundred tons of American water-rotted hemp; that the claimant made no application for a contract; that the proposal came from the Secretary; that no advertisements for proposals were issued, nor was any security demanded for the fulfilment of the contract, as the whole affair was considered as an experiment, made with a view to settle a question of great national importance. Mr. Paulding says, also, that his object was to remove the prejudice against the process of water-rotting, and demonstrate the practicability of producing a domestic article equal to the first quality of Russian hemp.

There is no doubt that the navy commissioners, under the direction of the Secretary, were competent to make the contracts in question for the delivery of American water-rotted hemp; but no question on that point need be made in the present case. The question presented is, whether the Secretary could bind the United States by his promise to indemnify the claimant for any loss he might sustain by making the experiment whether American water-rotted hemp could be successfully introduced. Such a promise gives the claimant liberty to make any experiments on the subject, at any time, and at any place within the United States. He is not limited either as to the amount of capital he might invest or the extent of the liability he might impose upon the government. He is to select the place of his operations, the agents to conduct the business, and the manner in which the experiments should be tried. It is in substance the appointment of an agent of the United States to exercise his own discretion, subject to no limitations, and personally responsible for no losses, except such as might happen in consequence of his own bad faith. The business was the claimant's, and the profits of it belonged to him, while the losses were to be made good by the government. If the experiments were successful, the benefit to the United States would be that we should depend upon American hemp for the supply of the navy, without being compelled to import it from Russia.

Now it is very clear that this is not a contract for the delivery of hemp to the United States; it is merely a contract to indemnify a citizen for an experiment which might or might not result in a national benefit. We are not aware that by any act of Congress, or by any practice, any Secretary is authorized to make a contract subject to no limitations of time or money, and subjecting the revenues of the government to contingencies of this character. The mere fact that the Secretary might cause a contract to be made for the supply of hemp does not authorize him to make the government substantially a hemp grower. If any power had been reserved to the Secretary to limit the liability of the government to some definite sum, or to provide that the government should exercise some superintendence over the matter, the undertaking would have had more equality in it; but as it is, nothing could be larger, looser, or more indefinite. The power is not only not given to the Secretary in terms to make such a contract, but it cannot be derived from, nor is it incident to any authority specifically given by law. The act in force in 1839 was the act of March 3, 1809, (2 Stat., 536,) the 5th section of which provided that "all purchases and contracts for supplies or services which are, or may, according to law, be made by or under the direction of either the Secretary of the Treasury, the Secretary of War, or the Secretary of the Navy, shall be made either by open purchase or by previously advertising for proposals respecting the same." It is very evident that from this law no inference can be made that the Secretary could bind the government by his promise to indemnify a citizen for his losses in making experiments in relation to the supplies for which the Secretary might contract; and we are of opinion that the claimant has no legal cause of action against the United States.

But there is a large class of testimony in this case, the result of

which it is proper should be submitted to Congress, that they, in their discretion, may act upon it as they shall deem just and proper.

It does not appear that any attempt was made by the government to supply the navy with American water-rotted hemp prior to the engagement with the claimant in the year 1839. There was a strong prejudice in Kentucky against water-rotting hemp, arising from the belief that it was unhealthy, and on this account the process was not practiced. Subsequent to the year 1839, the process of water-rotting was introduced in Kentucky, and it was in consequence of the claimant's efforts to break down the prejudices against it. It appears, also, that distinguished persons connected with the navy had often regretted that the process of water-rotting hemp was not introduced into the United States, and were of opinion that American hemp, water-rotted, would be superior to the Russian, because the Russian hemp was injured by the shipment and long voyage. The operations of the claimant convinced the community that water-rotting hemp was not unhealthy, and induced many persons to engage in the business. Many persons feared that it would create a pestilence, and public meetings were held for the purpose of inducing the claimant to discontinue his works, and threats were made of tearing down his works if he did not discontinue them. Although a portion of the hemp prepared by the claimant was rejected by the Navy Department, he still continued to encourage other persons to carry on the business. One of the witnesses for the claimant, Mr. James Story, of Kentucky, testifies that he engaged in the business, and had never seen any specimens of Russian hemp as good as some that he had prepared himself; but as this was rejected he made up his mind that he could not make hemp for navy purposes, and gave up the business. The claimant even found difficulty in preparing locations for his pools, and was compelled to pay double price for the hemp he used, and for hands necessary in prosecuting his experiments.

Mr. Henry Wallace, of Missouri, testifies that the claimant's experiments were successful, and all persons in the neighborhood became satisfied that hemp could be water-rotted without danger or injury to man or beast. All opposition ceased in the neighborhood, and the farmers, with the prospect of better prices and larger profits, engaged the next year (1841) more extensively in the growing of hemp. The farmers needed information and instruction as to the mode as well as the cost of water-rotting hemp. It does not appear that any losses sustained by the claimant were owing to any mismanagement on his part. It was the uncertainty of getting the government agents to approve and receive the hemp they might produce that discouraged the farmers in the business and induced them to abandon it. That there was a general prejudice against water-rotted hemp; that the claimant's experiments overcame that prejudice, and induced many farmers to engage in the business, appears from the testimony of Amos Kendall, James Story, Henry Wallace, Charles B. Lewis, William R. Bradford, Henry Von Phul, James W. Roberts, Thomas E. Courtenay, and C. D. Loveland. It also appears from the evidence, that the water-rotted hemp furnished by the claimant was stronger than the Russian hemp, although not so

clean. To this fact there is the testimony of William Cabin, a rope-maker employed by the government at Charlestown, Massachusetts. This witness testifies that water-rotted hemp is more valuable than dew-rotted hemp, because a certain injurious acid matter is removed thereby, and the lint is more free from gluten. It is stronger, makes brighter rope, and takes and holds tar better, because the tar does not readily penetrate the gluten remaining on the dew-rotted hemp, and works more freely than the other. American water-rotted hemp is generally stronger than the Russian, which is attributed to natural causes, as seed, soil, and climate. Mr. Cabin says that there was a strong prejudice against American hemp prior to 1841 in the minds of manufacturers and workmen, because it was harder to manufacture, and contained a great quantity of woody particles, and was not properly packed in the bales. But this prejudice has very much decreased of late years, as the preparation of the hemp has improved. Mr. Cabin thinks that when the American water-rotted hemp is prepared as it should be it is superior to the average Russian hemp, and states that about one-quarter part of all the hemp used in the navy is American water-rotted hemp.

The evidence shows that the fibre of this water-rotted hemp, furnished by the claimant, was much longer than that of Russian hemp, and on that account better for making into cordage. Lieutenant Porter, of the navy, testifies that water-rotted hemp is superior to dew-rotted hemp, as it is not deprived of its resinous quality, which is insoluble in water. Water-rotted hemp, he says, is prepared by immersion in water for a certain length of time, while dew-rotted hemp is prepared by exposure to dews and night air. The essential oil in the resin prevents the hemp from absorbing too much water or retaining it, and seems to add to its strength, and enables the hemp to hold tar better than the dew-rotted. In the latter, the tar constantly drips from it in hot weather, and in a short period it is deprived of tar, and soon rots. This witness states that there was no American water-rotted hemp used in the navy until the experiments made by the claimant. He says, also, that the character of American water-rotted hemp was superior to any other known, not excepting the best Russian or Liberian hemp. Subsequent to the year 1846, when the claimant abandoned the business on account of his difficulties with the government in the frequent rejections of his hemp, there was an abundance of American water-rotted hemp in the market, and the foreign article was almost excluded from the market. This officer states, that in his official and friendly intercourse with the officers of the navy acquainted with this subject, they regretted that the government pursued so rigid a course towards the claimant in so often rejecting his hemp, and thought a more liberal policy should be adopted towards him.

It is difficult to estimate with accuracy what sum it would be equitable to pay a person under these circumstances; but if Congress should be of the opinion that justice requires that the claimant should be indemnified to any extent, it is for them to determine the amount. The evidence tends to show that an active and enterprising man of business became embarrassed in his circumstances, and was

deprived of the just and fair profits of an honest occupation, by his efforts to promote a matter of national concern. We submit the whole matter to the consideration of Congress for such action as they, under all the circumstances, shall consider just and equitable.





SEN. }  
H. }

SENATE.

{ MIS. Doc.  
{ No. 131.

## REPORT

OF

## SECRETARY OF THE SENATE,

SHOWING

*of the persons employed in his office during the year 1857,  
and the sums received by them.*



ARY 5, 1858.—Read, ordered to lie on the table and be printed.

### OFFICE OF THE SECRETARY OF THE SENATE, *January 5, 1858.*

ance with the 11th section of the act of August 26, 1842,  
y of the Senate has the honor to report, that the following  
e been employed during the year 1857 in the office of the  
the Senate, and have received the sums opposite their  
ames, viz :

ckey, chief clerk.....	\$2,500 00
achen, principal clerk.....	2,160 00
Nicholson, principal executive clerk.....	2,160 00
ins, clerk.....	1,850 00
onald, do.....	1,850 00
trick, do.....	1,850 00
tton, do.....	1,850 00
t, clerk, from January 1 to December 6.....	1,724 32
, clerk.....	1,850 00
n, do.....	1,850 00
do.....	1,850 00
, clerk, from December 7 to 31.....	125 68
, keeper of the stationery.....	1,752 00
messenger.....	1,080 00
er, do.....	750 00
, page, from January 1 to June 30.....	250 00
page, from July 1 to November 30.....	207 88
page, from December 1 to 31.....	42 12

s and other persons authorized to be employ. d could not  
l with without injury to the public service.

ASBURY DICKINS,  
*Secretary of the Senate.*

N C. BRECKENRIDGE,  
*resident of the United States,  
and President of the Senate.*



1

2

## RESOLUTION

OF

### THE LEGISLATURE OF THE STATE OF TEXAS,

IN FAVOR OF

*The incorporation of Captain John G. Tod into the Navy of the United States.*

JANUARY 5, 1858.—Referred to the Committee on Naval Affairs, and ordered to be printed.

JOINT RESOLUTION recognizing the rank of Captain John G. Tod, late Texas navy, requesting our senators and representatives to use their influence to procure the passage of a law incorporating him in the United States navy, with the rank he held at the time of annexation.

Whereas the Congress of the United States did, at its last session, pass an act which was approved March 3, 1857, the twelfth section of which reads as follows: "*And be it further enacted, That the surviving officers of the navy of the republic of Texas, who were duly commissioned as such at the time of annexation, shall be entitled to the pay of officers of the like grade, when waiting orders, in the navy of the United States, for five years from the time of said annexation, and a sum sufficient to make the payment is hereby appropriated out of any money in the treasury not otherwise appropriated: Provided, That the acceptance of the provisions of this act by any of the said officers shall be a full relinquishment and remuneration of all claims on his part to any further compensation on this behalf from the United States government, and to any position in the navy of the United States.*"

The benefits of which act have been denied to Captain Tod by decision of the Secretary of the Navy of the United States, declaring the commission of Captain Tod void; and whereas it is believed that the decision of the Secretary of the Navy is erroneous, and that, if even technically correct, Captain Tod ought not, in justice, to be excluded from the benefits of said act of Congress by any mere irregularity connected with his commission; and whereas the legislature recognize as true the brief synopsis of the history of Captain Tod's connexion with the navy of the late republic of Texas embraced in the report of the committee on federal relations, accompanying this preamble, which history proves his connexion with said navy, in various capacities, from 1837, until it was surrendered to the United States, together with the flag of the republic, and that he discharged

the duties so well and so ably that he won from the republic, which he served in her hour of darkness and danger, the plaudits most dear to the patriot, "well done, thou good and faithful servant." Therefore—

SEC. 1. *Be it resolved by the legislature of the State of Texas, That we recognize John G. Tod as entitled to the rank of captain in the navy of the late republic of Texas, according to the commission issued him by President Anson Jones, on the 8th day of July, A. D. 1845, and now on file in the Navy Department of the United States, and that he is properly entitled to a continuation of his pay from the Congress of the United States, and should be so recognized by said government, and that we recommend his case to the special consideration of the federal government.*

SEC. 2. *Be it further resolved, That, as by accepting the five years' waiting orders pay under the aforesaid act, the officers of the Texas navy of 1843 and 1846 have made a full relinquishment and renunciation for further compensation and any position in the navy of the United States; that our senators and representatives in Congress are requested to use their influence to procure the passage of a law by the Congress of the United States, incorporating Captain John G. Tod in the navy of the United States, in the rank which he held at the time of annexation, as a souvenir to Texas of her naval interest in that great event.*

SEC. 3. *Be it further resolved, That the governor be requested to cause copies of this preamble and resolution, together with a copy of the report of the committee accompanying them, to be immediately forwarded to our senators and representatives in Congress.*

Approved December 1, 1857.

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DEPARTMENT OF STATE,  
*Austin, Texas, December 4, 1857.*

I, the undersigned, secretary of state of the State of Texas, hereby certify that the above and foregoing is a correct copy of the original joint resolution now on file in the department of state.

Given under my hand and the seal of the department of state, the [SEAL.] day and year first above written.

EDWARD CLARK,  
*Secretary of State.*

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COMMITTEE ROOM, *November 23, 1857.*

The committee on federal relations have had under consideration the petition of Captain John G. Tod, and beg leave to submit the following report, viz:

That, upon a full examination of the subject, and all the laws, regulations, and orders bearing upon the same, as far as the committee were enabled to do so, they have come to the conclusion that great

injustice has been done Captain Tod in refusing to recognize him as an officer of the Texas navy at the time of annexation, and thus excluding him from the benefits of the late act of Congress conferring five years' waiting orders pay upon the surviving officers of the navy of the former republic of Texas. They find the facts to be these :

Captain Tod entered the service of Texas as early as the spring of 1837, when he drew up a report, at the request of the Secretary of the Navy, establishing a navy yard, and in April, 1838, was invested with extraordinary powers to examine into and report fully in relation to all matters connected with the naval interest, with authority to send for persons and papers; and on the 26th May following received an order from President Houston, addressed to the several heads of departments, to afford him all necessary facilities and access to books and papers, so as to enable him to report to the executive such facts as were deemed of importance or value in relation to the public expenditures, &c.

June 10, 1838, he was ordered to the United States by President Houston on business connected with the navy, with rank and pay as master commandant. Fitted out the steamer Charleston at New York, and returned with her to Galveston in March, 1839, where her name and flag were changed, and she was commissioned as the Texas naval steamship Zavala. On his return with this steamship, as just mentioned, he was made a lieutenant, without his knowledge or consent, by the then existing government of Texas, upon the plea that the administration then in power refused to recognize the acts of the former one in giving Captain Tod an appointment of a higher grade.

He was afterwards, viz: in March, 1839, appointed naval agent to the United States, and July 5, 1839, commander.

Under his appointment as navy agent, he built and fitted out, in provisions, munitions of war, &c., complete, one sloop-of-war, two brigs, and three schooners for the navy, and returned with them to Texas. This agency terminated 10th June, 1840.

June 26, 1840, Captain Tod was placed in command of the naval station, Galveston, and August 6th of the same year his position was declared to be a separate command from afloat, and all officers on the station, vessels in ordinary, receiving ships, &c., placed under his orders.

November 18, 1840, he was appointed acting secretary of the navy by President Lamar, and, in his official capacity, suggested the blending of the war and navy departments, and the reduction of the personnel of the navy to one captain, one commander, and eight lieutenants, &c., which was adopted by Congress under the operation of this law; placing the navy in ordinary, and reducing the number of officers to such standard as the pecuniary resources of the country at that day would justify. Captain Tod lost his rank and station, being retained or appointed commander for the time being, and the senior commander of the service reduced to senior lieutenant, which positions they respectively held for some months, when Captain Tod was displaced on the ground that the senior lieutenant had preferable claims because of having been an older commander in the service. If Captain Tod had not been governed by those pure and patriotic motives

which his course as plainly indicates, he might easily have retained two captains instead of one, in the law drawn up and suggested by him, reducing the navy as aforesaid.

It will be seen, therefore, that Captain Tod held position in the navy, or was in some way connected with it, almost from the first existence of the republic; that his public services gave satisfaction to the country during this long period is fully attested by the report of the secretary of the navy, complimenting him highly for his valuable services in superintending the building of the naval vessels for Texas, as well as by a report of a joint committee of the two houses of congress in 1842, and a joint resolution of the same session; the committee represented by J. W. Byrne, chairman, on the part of the senate, and John B. Jones, on the part of the house, say:

"That, in all the transactions of the petitioner in his official relations to the government, his conduct has been marked by a paramount regard for the public good, and his duties have been performed with a fidelity and ability worthy of the trust reposed in him, and in a manner that entitled him to the confidence and approbation of his country; and, in consideration of the faithful services, prudent and discreet conduct, the firm and temperate discharge of his duties to the republic, your committee recommend the adoption of the following resolution:

*"Joint resolution, passing a vote of thanks to Captain John G. Tod, late commander of the naval station at Galveston.*

"SECTION 1. *Be it enacted, &c., That Captain John G. Tod, formerly naval agent to the United States, and late commander of the naval station at Galveston, is entitled to the thanks of this body for the faithful and important services he has rendered the country.*

"SEC. 2. *That the President be requested to order a copy of the foregoing report and resolution to be read at the navy yard, and on board of each of the public vessels in commission in the presence of the crew and officers, and that the same be entered in their log-books "*

When annexation was about being consummated, and it was known our naval vessels were to be transferred to that government to which we were yielding our nationality and our flag, it was supposed, as a matter of course, that the officers would go with the ships, and retain positions in the United States navy, corresponding with those previously held by them in our own. President Jones, therefore, on the 8th of July, 1845, commissioned Captain Tod as a captain in the navy, to give him the same rights and privileges other officers might enjoy under the change of government, and to which he was as clearly entitled as any of them. He did this because Captain Tod had long been connected with the navy as a faithful public servant, and only yielded his position at a time when it was deemed necessary to curtail the expenses of the government by reducing the navy, which he had himself suggested while acting secretary of the navy, and when it would have been an easy matter, as before suggested, to have retained a place for himself.

We now understand that the Navy Department at Washington decide against Captain Tod's claim on the hypothesis that the President of Texas had no power to appoint a captain in the navy; and if he had such power, that the commission is dated after instead of before annexation. We think the department in error on both these points; the second one is wholly untenable. We have never known the position taken by any one before that annexation was consummated on the 4th of July, 1845. This doctrine cannot be sustained in any court of justice. President Polk's message to Congress in 1845 shows that he viewed the Texas government in existence until December, 1845; and the government of the United States never assumed the right to collect duties through our custom-houses until after that date. We think, however, that annexation was not fully consummated until the republic of Texas yielded its power and authority to the State of Texas, which was on the 19th of February, 1846. The committee cannot see the necessity, and do not suppose any exists, for arguing this question further; for surely no one here will contend that our nationality was swept from us by the act of the convention on the 4th of July, 1845, more than five months before we were admitted by the act of Congress as a State of the Union, and more than seven months before President Jones yielded his mantle of authority to the newly inaugurated State. They can only express their surprise that such an unreasonable doctrine should have occupied the attention of the Navy Department for a moment.

In relation to the other point we remark, that the President undoubtedly had the right to appoint or reinstate Captain Tod at the time he did it. He only placed him in a rank he had formerly held, and drawn pay for, and which, we think, the general government fully recognized and acknowledged by allowing him three months' pay, after annexation, for taking care of the naval vessels until they were formally delivered over. We think, too, that the president of Texas, acting under the responsibility of his official oath and a proper sense of public duty, ought to have been considered the proper judge of his right to appoint, and that he would hardly have exercised a power in conflict with his oath of office.

The committee cannot believe that the Navy Department or Executive of the United States presume that a republic, situated as Texas was during her existence, should display the system and organization in either branch of her national defence to be found in their own.

But even if the committee deem one or both of the above objections well-founded, they still hold to the opinion that the federal government committed itself to respect Captain Tod's rank as a captain in the Texas navy by allowing him three months' pay as such, and ought not now to repudiate their own action and thus do him a great wrong.

In referring to the various laws under the late republic establishing the personnel of the navy, we find it difficult to arrive at a legal opinion upon rank or position of officers. We believe, from all the facts in the case, that the law abolishing or disbanding the navy in 1842-'43, under President Houston's administration, was more faithfully carried into effect by the executive than any other act of the congress of the republic. It is true the next congress repealed the law, for it was

found that no one had bid for the vessels at the offered sales of the navy. The personnel of the navy that had been disbanded were not reinstated; though we find that President Houston instructed the ministers, Messrs. Henderson and Van Zandt, under the treaty negotiations for annexation, to secure the rank of petitioner as a captain in the navy of the United States, in connexion with other officers of the Texas navy at that time residing in the republic.

The committee, in conclusion, recommend the passage of the accompanying preamble and joint resolution.

P. MURRAH,

*Chairman of Com. on Federal Relations.*

Hon. W. S. TAYLOR,

*Speaker of the House of Representatives.*





1. The first part of the document is a list of names and addresses of the members of the committee.

MEMORIAL  
OF  
HENRY O'RIELLY

CONCERNING

*Military highways or "stockade routes" for protecting travelers and settlers, facilitating mail and telegraph communication through vast interior territories, and rendering the United States independent of foreign countries for transmitting mails between the Atlantic and Pacific States.*

JANUARY 12, 1858.—Referred to the Committee on Military Affairs and the Militia.

Motion to print referred to the Committee on Printing.

Report in favor of printing submitted, considered, and agreed to.

MEMORIAL of Henry O'Rielly concerning military highways or "stockade routes" for protecting travelers and settlers, facilitating mail and telegraph communication through vast interior territories, and rendering the United States independent of foreign countries for transmitting mails between the Atlantic and Pacific States; which "stockade routes" could be quickly rendered immensely valuable in connexion with the troubles in Utah and other regions remote from the federal metropolis.

1. This memorial of Henry O'Rielly, constructor of the first telegraph lines which electrically connected the United States, respectfully sheweth:

2. That the failure of the federal government to furnish the protection of life and property which every American citizen should enjoy on at least two highways through the territories of the United States, (for convenience of the northern and southern parts of the Union,) has not only rendered us dependent on foreign routes with immense expenses for ordinary mail transportation between the eastern and western extremities of our confederacy, but has long prevented the extension of settlements and the establishment of express mails and telegraphic intercourse through the vast regions between the Mississippi and the Pacific States, (the telegraph lines between the Atlantic and the Mississippi having been established by this memorialist *ten years ago*, without any governmental assistance.)

3. That these and other great public advantages—advantages more fully set forth in his various memorials during the last ten years, set forth also in the proceedings of the St. Louis national convention of 1849, and in the resolutions of the Iowa, Nebraska, and other legis-

latures, specifically approving his proposals on those subjects, as shown in documents hereto annexed—may be quickly and economically realized by the American people generally, through the distribution of a couple of thousand dragoons in small parties along each of the two routes (northern and southern) through the territories between the Mississippi and Pacific States, inasmuch as the stationing of parties of twenty men at intervals of twenty miles along each of those routes would accomplish the objects with unparalleled promptness and economy—each party constructing its own stockade, like frontier settlers, and a portion of its dragoons riding each way every day, as patrols or sentinels, ten miles out and ten miles back—thus giving protection to travelers and settlers; while these patrols, moving with military precision, could transmit an express letter mail across our vast territories to the Pacific ocean in half the time now required, thus furnishing the safest, cheapest, and quickest mail route in the world, (where steam is not employed,) while at the same time furnishing better protection than was ever before extended to frontier settlers and travelers in any portion or period of our new territories; and in this way, while thus accomplishing great objects in the way of public defence and postal communication, affording incidentally the degree of protection required for the extension of telegraph lines through the territories of the United States, which territories, as far as postal facilities are concerned, are now more remote than Europe from the seat of our federal government, as witnessed in the difficulties of correspondence concerning the troubles in Kansas and in Utah.

4. The memorialist respectfully expresses the hope that if the President has not already adequate powers for thus stationing troops to protect intercourse through the territories, the requisite Congressional legislation will be effected in season to notify the public before next spring, as multitudes of enterprising settlers are ready to accompany the troops and stake out their locations for farms along the respective routes, the location of stockades serving as the foundations of towns along each of those highways across the public domain, which prompt action on the part of Congress would enable telegraphers generally (for the memorialist asks no special favors for himself or associates) to make speedy arrangements for extending lines through those vast territories which separate the Atlantic States from the newly organized governments on our Pacific coast.

5. The memorialist, in conclusion, respectfully refers to the various considerations urged by the authorities of Missouri, Iowa, and Nebraska, and by the St. Louis national convention of 1849, by which papers it will be seen that that convention expressly declared that the system of intercommunication proposed by the memorialist "is admirably adapted in every aspect in which it can be considered to the production of beneficial results;" while the legislatures of Iowa and Nebraska concurred in requesting their representatives to "use all proper efforts to procure the establishment of the policy herein advocated;" those legislatures declaring also that "this policy," if it had been adopted when first proposed by this memorialist, ten years ago, "would, ere this time, have caused the establishment of a continuous line of settlements, whereat settlers and travelers could readily find

sustenance and defence, together with postal and telegraphic facilities for communicating with their distant friends and with the business world, instead of being debarred from comfort and protection and correspondence for months (as at present) while traveling between the frontiers of Iowa and Missouri and the Pacific ocean."

All of which is respectfully submitted.

HENRY O'RIELLY.

NEW YORK, *January 5, 1858.*

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## APPENDIX.

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(Referred to as a part of Henry O'Rielly's memorial.)

### A.

#### ATLANTIC AND PACIFIC TELEGRAPH.

*Extracts from the report and resolutions published by the general committee of the national telegraph and railroad convention at St. Louis, 1849, approving O'Rielly's project for intercourse and correspondence across the American continent.*

At an early period during the past spring, the people of St. Louis, profoundly impressed with the importance of opening a commercial communication from the Mississippi to the Pacific, for the double purpose of binding to the Union our colonies on the western coast and of effecting a radical change in the route of commerce to China and the East Indies, assembled themselves in mass meeting to deliberate upon these important objects. In this meeting it was resolved that a *national convention* consisting of delegates from every State and Territory in the Union which might take sufficient interest in the grand object to appoint them, should be invited to assemble in the city of St. Louis, on the 16th day of October, to give expression to the will of the American people. After ample discussion, the following resolution, among others, was adopted:

*Resolved*, That the project of a great line of railway across the American continent is, in all its aspects, a national project; that, as such, it is due to every State and section of the Union that their opinions and views shall be heard, and their interests fairly considered; and that we deprecate any attempt to excite sectional jealousy, party rivalry, or personal feeling in reference to this important subject.

The mayor was then authorized to appoint a general committee of twenty-five citizens to address the people of the United States, and by correspondence and otherwise to secure a full representation in said convention. This committee was appointed accordingly by the mayor, and consisted of the following persons, viz:

L. M. Kennet, Tho. Allen, T. B. Hudson, M. Tarver, Henry Ker-ser, V. Stanly, A. B. Chambers, R. Phillips, John O'Fallon, Edward Walsh, John F. Darby, J. M. Field, L. V. Bogy, Geo. K. Budd, N. R. Cormany, John Loughborough, Charles G. Ramsey, J. C. Meyer, John Withnell, G. L. Lackland, Tho. T. Gantt, Tho. D. Yeats, Sam'l Gaty, O. D. Filley, A. Olshausen.

Acting in strict accordance with this magnanimous resolution, the general committee of twenty-five appointed by the mayor of St. Louis, of which I have the honor to be the chairman, at its first meeting constituted five sub-committees, viz: a committee to frame an address to the people of the United States; a committee of publication; a committee of finance; and a committee to prepare statistics for the use of the contemplated convention.

The committee upon the address were instructed to treat this subject as a great national measure, above all party considerations and all personal designs, in the construction of which the whole Union had a deep interest, and every section of it a right to have its sentiments considered. The duty imposed upon this committee, of which Thomas Allen, esq., was the chairman, was performed with fidelity and eminent ability. The committee of correspondence received a like instruction. That committee, of which A. B. Chambers, esq., was the chairman, conformed its action faithfully to the true spirit of the resolution of the people of this city.

Upon the committee of publication the duty was devolved of collecting from every one feeling an interest in the subject, essays and facts illustrative of the great purpose, and giving them to the people. In consequence of the prevalence of that most awful of calamities, the cholera, this committee, of which M. Tarver, esq., was the chairman, found it impracticable to accomplish much in reference to the objects for which it was constituted. The committee of finance, of which John C. Meyer is the chairman, has continued throughout to perform its duty with fidelity. Upon the committee on maps and statistics, of which J. Loughborough, esq., was the chairman, the duty was devolved of collecting and classifying facts and statistics illustrative of the project, together with accurate maps for the use of the convention. This was a most serious labor, and a most responsible duty; but I am gratified to believe that it was performed to the entire satisfaction of the general committee and of the national convention.

The first step taken by the committee on statistics was the composition, by its chairman, of the annexed essay upon a Pacific railway, which, after being approved by the committee of publication and the general committee of twenty-five, was inserted in the *Western Journal*. A large number of extra copies of that valuable periodical were ordered by the general committee for distribution; and we have abundant evidence, by letters from all parts of the Union, and through the public press, that its effect upon the public opinion of the country has been eminently beneficial.

Upon the day appointed for the organization of the national convention, the delegates met in the court-house in this city. The Hon. Abner T. Ellis, of Indiana, was unanimously called to preside over the assembly pending the appointment of its permanent officers. A

committee was then appointed to select permanent officers for this convention, and reported the name of the Hon. Stephen A. Douglas, of Illinois, as president of the convention, with a vice president from each State represented, and several secretaries; all of which nominations were unanimously concurred in by the convention.

The following States were represented in the convention, viz: Missouri, Illinois, Indiana, Kentucky, Pennsylvania, New York, Ohio, Iowa, Wisconsin, Michigan, Virginia, Tennessee, New Jersey, and Louisiana. The whole number of delegates was eight hundred and thirty-five.

\* \* \* \* \*

[As a pioneer of railroads and settlements, the St. Louis report makes the following statements:]

#### A TELEGRAPH TO THE PACIFIC.

*The necessity of such a line.*—In the present condition of things, it is almost impossible for the government of the United States to retain in its hands any supervisory control over the affairs of California and Oregon, without subjecting the citizens of those colonies to inconveniences and privations which no liberty-loving people can be expected to bear with for any great length of time. These colonies will, ere long, become States; their manufacturing and commercial power is rapidly on the increase; the capital of a large number of the enterprising cities of the Union is daily seeking investment on the coast of the Pacific; thousands of young men of intelligence and energy are annually emigrating to those countries, leaving families and friends here; the ships of our merchants are multiplying upon this great ocean; and new extensive and important commercial relations are opening with the thronging millions of China and the Indies. We have now a considerable military and naval force stationed on the Pacific coast; we are conducting important surveys of coasts and harbors; we shall soon be compelled to establish a system for the government and amelioration of the condition of the numerous Indian tribes, whose very names were, until recently, unknown to the civilized world; a new general survey of more than one hundred thousand square miles of territory, west of the mountains, must be made at an early period, numerous land offices established, and regulations framed for their government; and we shall find it necessary to enter upon a botanical and geological examination of this vast region, for the purpose of tracing the medicinal and useful properties of a new system of vegetable life, and of developing those immense mineral resources which have already excited the enterprise of the whole world. How can all this be done without a line of telegraph to the Pacific?

Again: with an energy and industry which have excited the admiration and astonishment of the whole Union, that peculiar people, the Mormons, have established themselves upon a rich valley interposed between the stupendous chain of the Timpanogos mountains and the Utah and Salt lakes. There their admirable organization, strict discipline, and general conformity of habits and opinions, have enabled them to accomplish more in four years than could have been

accomplished in fifty by a people analogous in principles and habits to the great mass of the people of the United States; and we are almost constrained to believe that Providence has guided these people into this isolated region for the express purpose of subduing a wilderness which would have appalled any other class of American citizens. Already have these people met in convention, and framed a constitution, with the view of applying at the next session of Congress for admission into the Union. In a few years more, groups of settlements and civilization will be scattered through the three "Parks," Bear River valley, the delightful valleys towards the sources of the Missouri and Columbia, and along the western base of the Wahsatch chain, to the valley of the Joaquim; and the State of Deseret will be surrounded by other communities, emulating it in the race of improvement and civilization. If we are to retain political connexion with all these extensive and valuable colonies, how are we to do it, save by the instrumentality of the telegraph and railway? It is obviously impracticable; and for these reasons, every public journal and every public man of respectability in the Union—so far as we have been enabled, after extensive correspondence, to ascertain—is decidedly in favor of taking prompt and efficient measures for the construction of these important works; and the whole people have sanctioned the policy without a solitary dissenting voice.

*A plan for its immediate construction.*—For this portion of this article we are indebted to Henry O'Rielly, esq., who has studied the subject with great care and attention for some years past, and whose eminent practical ability entitles his views to the serious and favorable consideration of the convention and of Congress. We have only to add, in introducing it, that we have ourselves traversed more than half the distance to the Pacific, and there made extensive collections of facts touching the character of the country, the trade with the Indian tribes, and the characteristics, condition, and resources of these tribes; and that, in our estimation, the scheme proposed by Mr. O'Rielly is admirably adapted, in every aspect in which it can be considered, to the production of beneficial results. This, too, we know to be the opinion of a number of intelligent persons who have been familiar for many years with the whole western territory and its contents.

The Congress of the Union have already authorized the construction of a line of posts from our western border to the Pacific, and directed a regiment of dragoons to be so distributed as to furnish a competent garrison to each. Of this contemplated line, two have been already built—one at the mouth of Table creek, near St. Joseph, and the other at Grand island, in the Platte river; and two more have been purchased—Fort Laramie, situated on Laramie's fork of the northern fork of Platte river, near the entrance into the Black hills, and Fort Hall, situated on the Lewis fork of the Columbia river. The objects which Congress had in view were to furnish protection and supplies to the emigrants and traders to Oregon and California, and to exercise a salutary restraint upon the Indian tribes. These posts are evidently situated too far apart to accomplish the purposes contemplated; for it is obvious that emigrating or trading parties, if attacked fifty or one

hundred miles from either of them, could not obtain relief until it was too late to be of any avail to them. As respects supplies, it is certain that no adequate quantity of them can be collected at these posts without a very extravagant cost in transportation; and, lastly, no effectual curb can be put upon the Indian tribes when the soldiery are collected into large parties at great distances from each other.

Mr. O'Rielly proposes that the Indian title be extinguished to a band of soil—say five miles on each side of the designed line of telegraph and railway; that palisade or brick forts, with ample enclosures, shall be erected, at distances of twenty miles apart, from the western border to the bay of San Francisco; that these enclosures shall be large enough to accommodate the garrison and give shelter and protection to parties of one hundred men with their animals and teams; that twenty dragoons shall be placed in each one of them; that a telegraph apparatus shall be placed in each; that a line of wires shall be constructed from the frontier to the bay; that Congress shall advance for its construction a fair sum, in consideration of which the perpetual use of it shall be secured to the government, or that the Congress shall give himself and associates, or other competent parties, the simple right of way, with the protection herein provided, paying for the despatches of the government at a fixed reasonable rate; that a daily mail shall be carried across the continent by the dragoons, each one being required once in fifteen days to carry the mail-bag, or drive a cart, to the centre of the intermediate spaces, there exchange bags, and return; that donations of land shall be made, for a limited period, to such persons, with or without families, as may actually settle upon the belt of land on which the Indian title has been extinguished; that the supplies of posts, in bread, cattle, and vegetables, shall be purchased of these settlers at a reasonable rate; that they shall be sworn not to introduce, under any pretence whatever, ardent spirits of any kind into the territories west of the State line and east of the Sierra Nevada; that they be authorized to give employment to such members of the Indian tribes, male and female, as shall evince a disposition to betake themselves to the pursuits of civilized life; and that the commanding officer at each post, alone or with other associates, shall be constituted into a civil and criminal tribunal, to do justice between the settlers, the emigrants, the traders, and the Indian tribes, with the privilege of appeal, in appropriate cases, to one supreme tribunal, to be fixed at some point along the line.

The more we have reflected upon this scheme, the more firmly are we convinced of its feasibility and utility. 1. It is, of course, absolutely necessary that the Indian title should be extinguished along the line of the contemplated telegraph and railway; and, moreover, it will be but an act of justice to compensate those tribes for the direct and fatal injury these works will inflict upon them by driving out the game—their only present means of subsistence. In this particular they have already seriously suffered in consequence of the extraordinary number of emigrants and traders who have passed through their territory. If this whole system shall be adopted, a portion of this compensation to them should consist of agricultural



implements and domestic cattle. 2. The palisades here recommended are of easy and cheap construction. They should be built in imitation of the traders' forts, and of those dotted all over British America by the Hudson's Bay Company. The soldiers themselves can construct them, without any cost whatever to the government. 3. Of course, they should be large enough to contain, in case of necessity, from one to two hundred persons. One hundred individuals are as many as can traverse the plains and mountains with any convenience, and parties should be limited to that number by law. Occasional jars with the Indians must, of course, occur. In these cases, a place of security, such as these palisades, may be necessary as a resort for the settlers until peace is restored. 4. Thirty soldiers are ample protection to each other, and, assisted by emigrants and settlers, can overcome a war party of six hundred Indians with ease. This number of trappers have been known to take beaver in the Blackfoot country for months together; and this is the fiercest and most implacable tribe between the Mississippi and Pacific. A party of twenty men has always been considered strong enough in any region south of the valley of the Yellowstone.

5 and 6. With a telegraphic instrument at each of these posts, a break in the wires could be discovered in a very brief space after it occurred, and the re-connexion can be made in an hour or two at any time. The posts would generally be secure, for Indians do not work to annoy their enemies; and in all our travels we have yet to see a male Indian chop a sapling down four inches through! Besides, there is no better reason for anticipating an injury to a telegraph line than to the forts of the traders; and an injury to the latter has very seldom occurred, although nothing is more common than for a party of a half-dozen white traders to remain at a fort for weeks together, alone, with large supplies of goods, and even alcohol, the Indian's nectar. Indians are like all other people; unless wantonly aggravated into passion, they duly consider their own interests.

7. It would probably be preferable for the government to advance a round sum at once, to aid in the construction of this line, instead of paying perpetually, even at half the usual rates, for its despatches. It seems to us that, at very moderate rates, the tax upon the government would be very considerable. However, this is a matter for the deliberate consideration of Congress. Whoever constructs it would probably prefer that nothing should be advanced, as their profits would be enormously enhanced.

8. This system for carrying the mail across the continent is one which will cost the government nothing. Upon any other plan of carrying the mail, the contractors must be paid a large sum, and the carriers must be furnished with a competent guard. Five thousand dollars per trip for carriers and guards seems to us a moderate estimate for the cost of a mail on the usual system. A semi-weekly mail would cost, at that rate, \$520,000 per annum. With the arrangements herein proposed, a mail will cost nothing, and the soldiers themselves will be absolutely benefited by this amount of active service.

## B.

*Intercourse between the Atlantic and Pacific States—Overland route, &c., &c.*

## STATE OF IOWA—IN GENERAL ASSEMBLY.

The rules of the senate having been suspended for the purpose, General Shields, senator from Dubuque, introduced the following preamble and resolutions, founded on the memorial to Congress from Henry O'Rielly, which, after three readings, were unanimously adopted; and the house of representatives concurred in the same—the governor adding his approval, as shown by the official signatures.  
(January 25, 1855.)

*Protection of intercourse between the Atlantic and Pacific States by an overland route.*

JOINT RESOLUTIONS of the General Assembly of the State of Iowa concerning the protection of settlers and emigrants between the Mississippi valley and the Pacific ocean, including the establishment of postal and telegraphic correspondence across the American continent.

Whereas the alarming increase of robberies and murders perpetrated on travelers and settlers by the Indian tribes between the Missouri river and the Pacific ocean, added to the difficulties ordinarily incident to the journey across the vast regions between those points, renders it indispensable that immediate measures should be taken by the federal government to protect at least one line of travel between the Mississippi or Missouri and the Pacific, by proper distribution of troops for guarding against the outrages and horrors to which American citizens are now constantly subjected in traveling across American soil between widely-separated portions of American territory;

And whereas it is the duty of all governments to furnish adequate protection to the people for whose welfare they were instituted—a duty which all civilized governments, including the American government, recognise in theory, and which the American government practises in reference to persons claiming its protection in foreign lands, whether it be in the rescue of shipwrecked sailors from Japan or the rescue of persons like Koszta from the fangs of European tyranny;

And whereas it is believed that the requisite protection for travelers and settlers can be secured (without additional expense) by a proper distribution of comparatively small numbers of troops in subdivisions, stockaded along any one or more of the routes between the Mississippi or Missouri and Oregon and California; thus rendering it practicable to accomplish the journey safely, to establish a continuous line of settlements, and to quicken the transmission of the mails between the Atlantic and Pacific; and thus incidentally, by affording adequate protection, rendering practicable the completion of telegraph lines between the Atlantic and Pacific States of this confederacy.

And whereas it is particularly due from the federal government that the enterprising settlers between the Missouri and the Pacific shall be protected in their lives and property while encountering the toils and dangers of pioneering in the civilization of those immense regions ; and that this protection is the more important, from the fact that, while thus affording proper protection for settlers as well as travelers, the protection thus afforded would incidentally facilitate correspondence by mail and telegraph between the American people dwelling on opposite sides of the continent, as well as at shorter intervals apart, through the whole extent of the vast line of travel between the Missouri and Pacific, as aforesaid, thus bridging North America by postal and lightning facilities for quickening the correspondence between Europe and the countries bordering on the Pacific ocean :

*Be it, therefore, resolved,* That, in the opinion of the general assembly of the State of Iowa, the subjects in the foregoing preamble should claim the immediate and favorable action of the Congress of the United States ; and that immediate measures should be taken for distributing the troops intended for protecting the western settlements against Indian depredations, so that parties of fifteen or twenty dragoons may be stationed in stockades (built like trading posts) twenty or thirty miles apart, requiring only from one to two thousand of the troops intended for the protection of emigrants and settlers, along some route across the plains and mountains between the Missouri and the Pacific, as proposed in O'Rielly's memorial to Congress, which was approved by the national railroad convention at St. Louis in 1849, and on which was founded the bill for effecting the objects in the United States Senate in 1852 ; some of those troops from each stockade to patrol the route daily between the stockades, and to transmit an express letter mail along the whole route between the Mississippi or Missouri and the Pacific, with greater speed and far less cost than any mail carried off a railroad route in America ; and with this great advantage, that, whereas the present mails between the Atlantic and Pacific States touch only at the two ports of New York and San Francisco, the overland mail route here advocated would afford its benefits to the whole country along its route—each stockade, or the town which would speedily be erected thereat, serving as a postal station as well as a telegraph depot for the distribution of intelligence among the people settled and traveling through all those vast regions, as well as for the transmission of governmental despatches between the Atlantic and Pacific sections of the Union.

*Be it also resolved,* as the opinion of the general assembly of Iowa, that such arrangements for the protection of life and property, if faithfully carried out with military precision by relays or patrols from each stockade, would guarantee the transmission of daily express letter mails between the Missouri and the Pacific—a distance of about two thousand miles—in about half the time now consumed between New York and San Francisco ; thus incidentally rendering this line one of the best and quickest mail routes in the world, and also the most economical, if the mounted soldiery should, as they might advantageously, transport light letter mails, without extra expense,

while performing their daily patrol duty along the route, thus protecting and encouraging traveling and settlement in the most efficient manner, and offering inducements for the immediate cultivation of lands along the route, for supplying emigrants and travelers, and at the same time incidentally securing the early construction and efficient protection of telegraph lines, which would "annihilate time and space" by the rapidity of their communications between the Atlantic and Pacific divisions of the United States.

*Be it therefore resolved*, That the senators and representatives of the State of Iowa in the Congress of the United States be, and they are hereby, requested to use all proper efforts to procure the establishment of the policy herein advocated—a policy which, if it had been adopted when first proposed seven years ago, would ere this have caused the establishment of a continuous line of settlements, whereat emigrants and travelers could readily find sustenance and defence, together with postal and telegraphic facilities for communicating with their distant friends and with the business world, instead of being debarred from comfort and protection and correspondence for months (as at present) while traveling between the frontiers of Iowa and Missouri and the Pacific ocean.

*And be it further resolved*, That the governor of the State of Iowa be and he is hereby requested to transmit to each of the senators and representatives of this State in Congress, copies of the foregoing preamble and resolutions.

REUBEN NOBLE,

*Speaker of the House of Representatives*

MARTIN L. FISHER,

*President of the Senate.*

Approved 25th January, 1855.

JAMES W. GRIMES.

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C.

MISSOURI.

(From the message of Governor Price, December, 1854.)

The extension of our dominions to the shores of the Pacific, the rapid growth of communities on that coast, and the multiplication of our commercial relations with Eastern Asia and the western borders of South and Central America, have at last awakened the public mind to the importance of opening new and more rapid lines of communication between the valley of the Mississippi and the western limits of our possessions. Intelligent, enterprising, and patriotic individuals have devoted their talents and time to the subject, and a number of plans for the construction of a railroad have been laid before the public. Such a work must be either northern, southern, or central. If it be a northern one, its eastern terminus would probably be in Wisconsin or northern Illinois, thus enabling the northwestern States to monopolize the advantages and profits. If it be a southern

one, its eastern terminus will be probably at Galveston or New Orleans, thus enabling the southwestern States to hold a like monopoly. If it be central, its eastern terminus would be at some point on the western border of this State, and the products of our traffic with those of the country watered by the Pacific and its tributaries might be thence distributed, by means of branches, to every section of the Union; thus giving all the States as equal a participation in the benefits as it is possible to give them. It is to be hoped, therefore, that Congress, in whatever it may do to encourage the construction of this great work, will not weaken the bonds of the Union by sectional partiality.

That such a road can be constructed at a reasonable outlay, on any one of a number of lines between our northern and southern frontier, has been abundantly demonstrated. That if constructed upon a central one, it will strengthen the bonds of our Union, multiply communities west of us, bring into cultivation many millions of acres which must otherwise continue to be a wilderness, develop vast beds of rich mineral resources, and augment our national wealth, by an increase of our revenues, manufactures, domestic and foreign commerce, is so clear, that arguments to prove it would be a work of supererogation.

Intimately connected with this subject, being only an additional means of communication, is the construction of a line of telegraph and the carriage of a daily mail across the continent. Under our present arrangement, letters arrive at New York from San Francisco in twenty-five to thirty days, and in St. Louis in thirty to forty days. If a line of enclosures, such as the fur traders erect, were built at distances of thirty miles from one to another, from our border to San Francisco and Oregon, a daily mail could be carried (at least a letter mail) in seventeen to twenty days, through the whole year; thus reaching St. Louis and New York earlier than at present, and at little over one-half the present contract price. These posts would afford protection to our emigrants and traders, and be also telegraph stations, bringing us at once into hourly communication with our brethren on the Pacific.

The United States unquestionably owe protection to their emigration and infant communities. That they are not sufficiently protected is very evident from the bloody and cruel massacres which have been so frequently perpetrated against them. If Congress should determine to provide more effectual means against such distressing occurrences in the future, a regiment of a thousand troops, garrisoned in these posts, would give the necessary protection, and might be required to carry the mails between our western border and the Pacific. The whole amount necessary for the pay, equipment, and support of these troops would not exceed one-half the sum now paid for transporting the mails between New York and San Francisco. The protection thus afforded would induce an immense travel upon this line, that would prefer the inland route to the circuitous and dangerous one by sea. It would also cause a line of settlements to spring up along these posts that would soon be able to furnish shelter, necessities, and even comforts to the traveling community, which again, in their turn, would increase, encourage, and invigorate the settlement.

Thus would be formed a great chain of settlements spanning the continent; and a grand highway of emigration, travel, and trade would be opened.

It is needless for me to expand this subject into all its details. They will suggest themselves to every reflecting mind. There are numbers of our enterprising citizens who are anxious to undertake the construction of a line of telegraph and the carriage of such a mail, if they can only receive as much encouragement in these enterprises as is given at every session of Congress to schemes of much inferior importance. A grant of 500,000 acres of land to this State, or to the Territory of Kansas, would enable either to contract for and secure the construction of a Pacific telegraph. These would be but the precursors to a great line of railway, which, when completed, would bring all our possessions into such intimate communion as would create as profound attachment to the constitution and the Union at the circumference as in the centre of the confederation. I recommend to you such action on those subjects as will stimulate our senators and representatives in Congress to zealous efforts in behalf of these works, and the Congress itself to more efficient and decisive measures.

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D.

(From the Iowa Capital Reporter, January, 1855.)

MESSAGE OF THE GOVERNOR OF NEBRASKA.

Acting Governor Cuming, in his address to the Nebraskans, upon the stormy 16th, endorses substantially the suggestions of O'Rielly's memorial as to the establishment of an overland mail route; urges the passage of laws to accelerate progress in the various departments of commerce and manufactures; favors the enactment of provisions insuring a supply of timber, by raising forests upon the arable soil; advises a specimen of every mineral found in the Territory to be deposited in a territorial cabinet at Washington; recommends the organization of volunteer companies for self-protection; and alludes at length, and with great fervency, to the doctrine of popular sovereignty.

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NEBRASKA.

(From the message of Governor Cuming, January 17, 1855.)

One of the principal subjects of general interest to which, next to the enactment of your laws, your attention will be directed this winter, is that of a Pacific railroad. You have acquired, in respect to this, an acknowledged precedence; and the expression, in your representative capacity, of the wishes of your constituents throughout the vast extent of your territory, may have a potent influence, together with the efforts of your friends, in promoting the construction of such a road up the valley of the Platte.

Many reasons lead to the conclusion that such a memorial from you will be of practical efficacy in contributing to the speedy consummation of such an enterprise—an enterprise of such absolute necessity as a means of intercommunication between the Atlantic and Pacific States, and as the purveyor of a lucrative commerce with India, China, and the Pacific islands. Among these are the facts that the valley of the Platte is on the nearest and most direct continuous line from the commercial metropolis of the east, by railroad and the great lakes, through the most practical mountain passes, to the metropolis of the west; that it is fitted by nature for an easy grade; and that it is central and convenient to the great majority of grain growing States and of the northern portion of the Union, being situated in latitude 41 degrees north, while the majority of the people of the whole country are between the 38th and 46th degrees of north latitude. It seems to me that it will be the desire of the friends of this great enterprise—one of the most prominent and important of all the measures of national development upon this continent now under the consideration of the people of the United States—to act immediately in the selection of routes and to establish a permanent policy, the details of which may be practically prosecuted in the coming spring; and I sincerely hope and believe that your legislative memorial in Congress may have its legitimate weight in the decision of a question of such momentous interest.

In view, however, of the uncertainty arising from the sectional conflict with which the subject is surrounded, I would respectfully suggest that such a memorial should urgently, if not principally, ask for a preliminary provision, from granting which the general government will scarcely be deterred by considerations of policy or economy. I refer to a proposition presented to Congress, eight years ago, for “telegraphic and letter mail communication with the Pacific, including the protection of emigrants and formation of settlements along the route through Nebraska, Utah, California, and Oregon, the promotion of amicable relations with the Indians, and facilitating intercourse, across the American continent, between Europe and Asia and the islands and American coasts of the Pacific.”

This plan is substantially that, instead of, or in addition to garrisons at isolated points, parties of twenty dragoons shall be stationed at stockades twenty to thirty miles apart, on a route designated by the Executive of the United States, as a post road between the Missouri river and the Pacific; that express mails shall be carried by said dragoons riding each way and meeting daily between the stockades; thus affording complete supervision and protection of a line of electric telegraph constructed by private enterprise.

By such an arrangement, in which every detail is subject to free public competition, a line of telegraph may be opened within one year to the Rocky mountains, and a largely increased mail transported in half the time now required, and with perfect security, between the Atlantic and Pacific States; at the same time giving complete protection to the thousands who annually travel on the route, and conducing not only to the settlement of Nebraska, but of the vast regions between us and our fellow-pioneers upon our western coast.

Such an emigrant highway would afford one of the best and speediest mail lines in the world, giving efficiency to the troops already in service for purposes of protection, encouraging emigration, and making a continuous series of settlements and cultivated farms around the stockades, between which individual or corporate enterprise will the more speedily construct the long desired and expected Pacific railroad.

The location of Nebraska, remote from but intermediate between the Atlantic and Pacific, indicates the necessity of facilitating intercourse between its inhabitants and their fellow-citizens on the shores of both oceans. It is the duty of governments to defend life and property, and protect and quicken communication between all portions of their domain; and this requirement is especially imperative upon the federal and State governments of our widely extended Union, in respect to territories where civilization is struggling for a foothold, and the farms and firesides of whose pioneers have a just claim upon the protection of a power whose fleets are traversing every sea for the defence of its citizens.

Aside, too, from the direct practical blessings of such a system faithfully carried out in all its details, and its immense effect on the correspondence and business of the world, the project acquires additional importance from the fact that it will contribute to bind together States far separate and of diverse interests in the commercial fraternity and sympathy of an inseparable union.

We may reasonably expect that a memorial advocating the advantages of the Platte valley as a route for the Pacific railroad, and urging especially and strenuously the immediate adoption of a policy similar to the above, would not be without its influence upon the deliberations of Congress.

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(Referred to as a part of Henry O'Rielly's memorial.)

E.

*Nebraska Legislative Resolutions, (or Memorial.)*

In accordance with the spirit of the foregoing recommendations in the governor's message, the Nebraska legislature unanimously adopted the resolutions previously adopted by the Iowa legislature (marked B) *mutatis mutandis*, and requesting the delegate from Nebraska (Colonel Chapman) to present those resolutions to Congress as a memorial from the legislature of Nebraska praying for the prompt action of Congress in carrying into effect the system of intercommunication and protection proposed by Henry O'Rielly, in connexion with the completion of the Atlantic and Pacific telegraph.

The annexed extract from acting Governor Cumings's message to the legislature on the 9th December, 1857, indicates the firmness and zeal with which this proposed policy is cherished in Nebraska Territory.



maintain themselves amid the "Everglades" in defiance of our troops, after having already cost hundreds of lives and many millions of dollars.

With such vast sacrifices, through four and twenty years, to subdue a handful of Seminoles, where our troops surround them by land and water, who will predict the severity or duration of warfare waged by our army, a thousand miles from supplies, against rebels animated by fanatical zeal and military fury like the Mormons, fighting by their own firesides, in alliance with the most powerful Indian tribes of our continent, and dwelling among mountain strongholds, rendering their power formidable, like that of the Caucasians with their bloody resistance to the Russian armies?

With the example of the "Maroon war," also before us—a war wherein the British government sacrificed thousands of lives and millions of money in a struggle for many years in subduing the insurgent negroes of the Jamaica mountains—it is seemingly probable, now that the Mormons are resolved on maintaining their mountain strongholds, that the *war of Utah* may be long continued as well as desperate, and that *telegraphic intercourse* will become one of the most important elements of sustenance towards the troops operating against rebellion in that isolated region, distant a thousand miles from reinforcement and supplies.

In conclusion, the memorialists repeat their proposition for an extension of telegraphic facilities to the seat of war, and express their hope that the action of the government will be taken in time to afford opportunity for completing arrangements to take the field with several efficient bodies of telegraph constructors at the earliest practicable period of the approaching spring.

All which is respectfully submitted.

HENRY O'RIELLY, of *New York*.

J. J. SPEED, JR., of *Michigan*.

TAL. P. SHAFFNER, of *Kentucky*.

NEW YORK, *January 8*, 1858.

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IN THE SENATE OF THE UNITED STATES.

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JULY 28, 1856.—Received from the Court of Claims and referred to the Committee on Claims.

AUGUST 8, 1856.—Bill S. 440 and report.

DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

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The COURT OF CLAIMS submitted the following

**R E P O R T.**

*To the honorable the Senate and House of Representatives of the United States in Congress assembled :*

The Court of Claims respectfully presents the following documents as the report in the case of

**ERNEST FIEDLER vs. THE UNITED STATES.**

1. The petition of the claimant.
2. Claimant's brief.
3. Depositions taken in the case, and transmitted to the House of Representatives.
4. Claimant's statement, showing the amount demanded, transmitted to the House of Representatives.
5. Opinion of the Court in favor of the claim.
6. Dissenting opinion of Judge Blackford.
7. Bill for the relief of claimant.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this tenth day of July, A.  
[L. s.] D. 1856.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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IN THE COURT OF CLAIMS.

ERNEST FIEDLER's *claim* for duties illegally exacted on ammonia.

*To the honorable the Court of Claims :*

The petition of Ernest Fiedler, of the city of New York, merchant, respectfully represents, that the government of the United States is justly indebted to your petitioner for money had and received, illegally

exacted of your petitioner by the collector of the customs, duly authorized by the said government to act as such collector at the port of New York.

Your petitioner further shows, that on or about the 19th day of June, 1854, your petitioner addressed a letter to the Treasury Department, as follows, viz :

“ NEW YORK, *June 18, 1854.*

“ The petition of Ernest Fiedler, importing merchant, of the city of New York, respectfully represents that he has imported into the port of New York divers importations of ammonia, and on entry of the same for consumption was required to pay duties after the rate of 20 per centum, the legal duty being 10 per cent.; and the excess of duty paid on said importations amounts to \$554 10, a statement of which is forwarded herewith.

“ Your petitioner has applied at the collector's office to the auditor for a certified statement of the excess of duties exacted on his several importations of ammonia, commonly called carbonate of ammonia, and the auditor offered to prepare a statement for part of such excess, viz : for so much as was paid under protest within six years last past, and declined to include anything more, whereby he disallows \$317 60, excess of duty paid without protest, and \$75 38, paid under protest in February and April, 1847, more than six years since.

“ Your petitioner further shows that he, with Messrs. G. D. Phelps & Dodge, and H. M. Scheffelin & Fowler, and other importers of ammonia, undertook, by means of judicial decisions, to determine the legal rate of duty on ammonia, and a suit was instituted in November, 1849, in the name of George D. Phelps & Dodge *vs.* Cornelius W. Lawrence, and the plaintiffs recovered a judgment on the importations included in that suit. But inasmuch as the treasury did not acquiesce in that decision, it became necessary to institute the suits of H. M. Scheffelin & Fowler *vs.* Collectors Lawrence and Maxwell, in December, 1851, which resulted in a decision in January, 1854, that the duties imported of ammonia, commonly known as carbonate of ammonia, was 10 per cent., in which decision the department acquiesced.

“ Your petitioner further shows that in the years 1847, 1849, 1850, and 1851, it was understood to be the rule and practice of the Treasury Department to refund duties collected in excess, under decisions of the United States courts, paid with or without protest, whether such excess had been paid for less or more than six years; and that formal protest, at the time of payment, was advisable only so far as to secure a right of action against the collector, and the further right to collect by suit the interest in addition to the amount paid in excess.

“ Your petitioner, intending to rely upon the decision to be made in the cases pending against the collectors to determine the legal rate of duty, and not intending to resort to a suit for the purpose of collecting interest, omitted on some of his entries to make the formal protest, and he did not, (when the department was refunding duties paid for more than six years,) enter suit merely to prevent the demand on the treasury from becoming outlawed.

"Your petitioner might now institute suit and recover the interest with costs on a portion of his claim, and such interest and costs would amount to more than the sum of \$75 30, paid under protest in 1847.

"Considering that the cases of Phelps & Dodge and Scheiffelin & Fowler's, above referred to, were prosecuted in part to benefit your petitioner, and that he has not, by instituting suit, caused costs and damage to the department, and considering the uniform course of the department to refund, under judgment, on sums paid in excess, although more than six years may have elapsed, and that the department has had the money of your petitioner for a length of time without interest, and also \$317 60 paid without protest, your petitioner most respectfully requests that instructions may be given requiring the collector at the port of New York to examine the claim herewith presented, and to grant a certified statement of the excess of duties paid under protest by your petitioner in the years 1847, 1850, 1851, 1852, on the importations referred to in said statement.

"Very respectfully, your obedient servant,

"E. FIEDLER.

"HON. JAMES GUTHRIE,

"*Secretary of the Treasury.*"

Your petitioner further shows that the Treasury Department refused to refund the excess of duties, paid under protest, for more than six years, but refunded so much of the excess of duties paid under protest as had been paid within six years, amounting to one hundred and sixty-one dollars and twenty cents, (\$161 20,) and the residue of excess now claimed amounts to \$392 90, as appears by the statement hereunto annexed.

Your petitioner further shows that by the act of July 30, 1846, section first and schedule G, a duty of 10 per cent. *ad valorem* was imposed upon "ammonia" when imported into the United States, (9 Statutes at Large, 42.) In violation of which act, the collector of the customs at New York demanded and required of your petitioner a duty of 20 per centum *ad valorem*, to be paid by your petitioner upon his importations of ammonia aforesaid, as for duties due to the United States on the same, and the money so exacted and paid by your petitioner to the collector aforesaid, over and above the legal duties, amounted to three hundred and ninety-two dollars and ninety cents, (\$392 90,) was by your petitioner paid to the collector of the customs in order to obtain possession of his imports aforesaid, and, as your petitioner believes, the same was, by the collector aforesaid, in the regular discharge of his official duties, paid over to the treasury of the United States, all which will appear by the invoices, entries, and records of the collector's office, at the port of New York, to which for greater certainty your petitioner refers. Your petitioner further says that no part of the excess of duties now claimed has been refunded to him, and his right to claim and receive the same has not been alienated by assignment or operation of law.

Wherefore, your petitioner, relying upon the justice of his claim

and the *Constitution of the United States*, which provides that private property shall not be taken for public use without just compensation, (1 Statutes at Large, 21,) humbly prays your honorable Court to grant such relief, by a bill in favor of your petitioner, as may be suitable and necessary, in order that the said sum of three hundred and ninety-two dollars and ninety cents may be refunded, with interest, on the same from the time of payment.

ERNEST FIEDLER,  
Per EMILE H. JACQUELIN,  
*Attorney.*  
CHAS. E. SHERMAN, *Attorney.*

NEW YORK, *July 26, 1855.*

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STATE OF NEW YORK, }  
*City of New York,* } ss.

I, Emile H. Jacquelin, attorney for Ernest Fiedler, being sworn, say that he has read the foregoing, and the facts stated in the petition are true, to the best of his knowledge and belief.

EMILE H. JACQUELIN,  
*Attorney.*

Sworn to before me this 26th day of July, 1855.

GEORGE F. BETTS,  
*U. S. Commissioner.*

*Statement of duties paid in excess on ammonia, by Ernest Fiedler, entered at the port of New York, from London.*

Date of import.	Name of vessel.	Quantity in casks.	Amount of excess paid.	Amount paid under protest.
1846.		<i>Barrels.</i>		
November ..... 30	Warehoused.....			
Entered.				
December ..... 12	Per St. James.....	10	\$36 80	
1847.				
February ..... 11	Victoria.....	10	36 60	\$36 60
April ..... 7	Northumberland .....	10	38 70	38 70
May ..... 10	Mediator .....	10	36 40	
June ..... 19	Hendrick Hudson .....	10	37 90	
July ..... 27	Westminster .....	10	39 10	
November ..... 6	Sir Robert Peel.....	10	34 60	
1849.				
July ..... 25	Devonshire .....	10	28 70	
August ..... 27	Southampton .....	10	32 50	
1850.				
May ..... 11	Southampton .....	5	19 40	
May ..... 20	Independence.....	10	41 10	41 10
1851.				
January ..... 15	York Town .....	10	39 60	39 60
May ..... 17	John Henry .....	10	42 40	42 40
November ..... 3	Patrick Henry.....	10	52 20	
1852.				
October ..... 23	Ocean Queen.....	10	38 10	38 10
	E. & O. E.		554 10	236 50

Of the above amount.....	\$554 10
there was refunded.....	161 20
Balance claimed.....	392 90
with interest on same.	

ERNEST FIEDLER,  
Per EMILE H. JACQUELIN, *Attorney.*

NEW YORK, June 19, 1854.

## IN THE UNITED STATES COURT OF CLAIMS.

ERNEST FIEDLER  
*vs.*  
 THE UNITED STATES. } No. 185.

*Brief of legal points and authorities, according to Rule 20.*

The facts of this case are sufficiently set forth in the petition.

By the tariff act of July 30, 1846, section 1st, schedule G, a duty of 10 per cent. was imposed on "ammonia."—(9 Stat. at Large, 42.)

This act was in force, and should have governed the collector in assessing the duty.

The collector exacted a duty of 20 per cent., and claimed as authority for his doing so treasury instructions of December 31, 1847.

In behalf of the petitioners, it will be contended, on the case shown in the petition, and also in the evidence, that the collector erred :

In that he exacted a duty of 20 per cent. on ammonia, commonly called carbonate ammonia, and that ammonia, in this form, was liable to but 10 per cent., and so decided by the United States circuit court of New York in the cases of George D. Phepps and Dodge *vs.* Lawrence, H. M. Schieffelin and Fowler *vs.* Lawrence, and same *vs.* Maxwell. See manuscript report of each case by the United States district attorney, transmitted to the Treasury Department; and by the Treasury Department, in a letter dated March 21, 1854, addressed to Collector Redfield, adopting said decisions as its rule of construction, and authorizing refunding duties on ammonia.

The excess of duty compulsorily and illegally exacted was \$554 10, of which sum there was refunded \$161 20 by the Secretary of the Treasury. The balance now claimed, \$392 90, was paid into the treasury of the United States.

The money so exacted, and paid into the treasury, may be recovered before this Court, because the said money was obtained without law, and contrary to the act of July 30, 1846, section 1st, schedule G.

CHAS E. SHERMAN,  
 JOHN ELY,

*Atty's for Petitioners.*

ERNEST FIEDLER *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court :

In the years 1846, 1847, 1849, 1851, and 1852, the petitioner imported into the United States divers quantities of carbonate of ammonia, on all of which a duty of twenty *per centum ad valorem* was exacted. He insists that it was subject to a duty of ten *per centum ad valorem*, only. (9 Stat. at Large, pp. 42, 48; schedule G.)

The case is, in its circumstances, like the case of Henry & Frederick W. Meyer *vs.* The United States, and to be governed by the same

principles. See the opinion of this Court in that case, and the opinions thereto appended. We are of the opinion that the ammonia imported by the petitioner was subject only to a duty of ten *per centum ad valorem*, and that the excess ought to be refunded to him.

The following table will show when the duties were paid; in what vessels the ammonia was imported; the amount of duties actually paid; the amount of duties at ten *per centum ad valorem*, and how much was paid under protest:

When paid.		Vessel.	Duties actually paid.	Duties at ten per centum ad valorem.	Paid under protest.
1846.					
December	12	St. James.....	\$73 60	\$36 80	\$36 80
1847.					
February	12	Victoria.....	73 20	36 60	36 60
April	7	Northumberland.....	77 40	38 70	39 70
May	12	Mediator.....	72 80	36 40	-----
June	21	Hendrick Hudson.....	75 80	37 90	-----
August	2	Westminster.....	78 20	39 10	-----
November	23	Sir Robert Peel.....	69 20	34 60	-----
1849.					
July	27	Devonshire.....	57 40	28 70	-----
September	1	Southampton.....	65 00	32 50	-----
1850.					
May	29	Southampton.....	38 80	19 40	-----
1851.					
November	6	Patrick Henry.....	101 40	52 20	-----

Excess claimed, to be refunded..... \$392 90

We shall report to Congress a bill in favor of the petitioner for three hundred and ninety-two dollars and ninety cents.

#### ERNEST FIEDLER *vs.* THE UNITED STATES.

Dissenting opinion by Judge BLACKFORD :

Suit for overpaid duties.

I dissent from the final judgment rendered in this case by a majority of the Court in favor of the claimant.

As to the duties on the imports by the St. James, Victoria, and Northumberland, one of the witnesses, Jacquelin, says there were protests in writing, but says nothing as to the forms of the protests. Another witness, Griswold, says there is on the entries in those three cases "a protest in writing purporting to be signed by the petitioner, in which the petitioner protests against paying twenty per cent. and claims that it should be ten per cent." The objection to this evidence is: 1. That copies of the protests should have been produced to this



Court. 2. That the act of Congress of 1845 requires that the protest shall state "*distinctly and specifically the grounds of objection.*"—(5 Stat. at Large, 727.) The saying that the duty should not be twenty but ten per cent. is merely stating a conclusion of law. There is no proof, therefore, of a legal protest in either of those three cases; and that is the ground of my dissent in those cases.

As to the duties on the imports by the other vessels, namely, *Mediator*, *Hendrick Hudson*, *Westminster*, *Sir Robert Peel*, *Devonshire*, *Southampton*, and *Patrick Henry*, the payments were made without any objection whatever, either written or verbal. That is the ground of my dissent in the last named cases.

The dissenting opinions heretofore delivered by me in the cases of *Sturgess, Bennett & Co. vs. The United States*, *Spence & Reid vs. The United States*, and *Wood vs. The United States*, are hereto appended, and referred to as a part of this opinion.

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STURGES, BENNETT & Co. vs. UNITED STATES.

The opinion of the Court was delivered by Judge SCARBURGH :

In this case the petitioners allege that, during the years 1847, 1848, 1849, 1850, and 1851, they imported into the United States certain quantities of brandy and other liquors, in casks, and paid duties thereon at the rate of one hundred *per centum*, not only on the value of the quantity of liquor ascertained by guage to be contained in the casks, but also on the value of the quantity of liquor which had leaked out of the casks on the voyage of importation; and that they claim a return of the moneys exacted from them as import duties on such leakage or non-imported liquors.

The petitioners refer in their petition to a certified statement prepared by the collector of New York, by order of the Secretary of the Treasury, for a particular account of their claim. From this statement it appears that, under instructions of the Secretary of the Treasury, the duties upon their importations were levied according to their invoice value, without reference to deficiencies, unless arising from accident at sea. It was conceded, in the argument submitted in this case, that the leakage arose, not from any accident at sea, but from other causes, and that the deficiency was ascertained from the return of the gaugers.

The act of Congress entitled "An act reducing the duty on imports, and for other purposes," approved July 30, A. D. 1846, imposed a duty of one hundred *per centum ad valorem* on brandy and other spirits distilled from grain or other materials imported from foreign countries. According to the principles settled by the cases of *Marriott vs. Brune*, (9 How. R., 619,) the *United States vs. Southmayd*, (*Ibid.*, 637,) and *Lawrence vs. Caswell*, (13 How. R., 488,) this duty is imposed, not upon the quantity of brandy which may have been purchased abroad, but upon the quantity which actually arrives in this country.

In the case of *Marriott vs. Brune*, duties had been imposed upon

importations of sugar and molasses made after the act of 1846, according to the invoice quantity; but the report of the weighers and gaugers showed a deficiency between that quantity and the quantity actually imported. Mr. Justice Woodbury, who delivered the opinion of the Court, said: "The general principle applicable to such a case would seem to be, that revenue should be collected only from the quantity or weight which arrives here. That is, what is *imported*—for nothing is imported till it comes within the limits of a port.—(See cases cited in *Harrison vs. Vose*, 9 Howard, 372.) And by express provision in all our revenue laws, duties are imposed only on imports from foreign countries; or the importation from them, or what is imported.—(5 Stat. at Large, 548, 558) The very act of 1846 under consideration imposes the duty on what is 'imported from foreign countries.'—(P. 68.) The Constitution uses like language on this subject.—(Art. I, §§ 8, 9) Indeed, the general definition of customs confirms this view; for, says McCulloch, (vol. I, p. 548,) 'customs are duties charged upon commodities upon their being imported into or exported from a country.'

"As to imports, they, therefore, can cover nothing which is not actually brought into our limits. That is the whole amount which is entered at the custom-house; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufactures; and we are unable to see any principle of public policy which requires the words of the act of Congress to be extended so as to embrace more.

"When the duty was specific on this article, being a certain rate per pound, before the act of 1846, it could of course extend to no larger number of pounds than were actually entered. The change in the law has been merely in the rate and form of the duty, and not in the quantity on which it should be assessed.

"On looking a little further into the principles of the case, it will be seen that a deduction must be made from the quantity shipped abroad whenever it does not all reach the United States, or we shall in truth assess here what does not exist here. The collection of revenue on an article not existing, and never coming into the country, would be an anomaly, a mere fiction of law, and is not to be countenanced where not expressed in acts of Congress, nor required to enforce just rights."

The same doctrine is directly applied to importations of brandy, in the case of *Lawrence vs. Caswell*.

It is, moreover, held in these cases, that the quantity actually imported is to be ascertained by the gauger's return. In the case of *Lawrence vs. Caswell*, the question whether the duty ought to be computed on the quantity stated in the invoices, or on the contents as ascertained by the gauger's return, was, *in terms*, considered by the court, and the decision was, that the duty ought to be computed on the latter, and that this question was substantially the same with that decided in the case of *Marriott vs. Brune*. It may be true, as suggested by the Solicitor, that there is no mode in which the quantity imported can be ascertained with absolute certainty; but there can

be no doubt, we think, that the decision of the Supreme Court, recognizing the measurement by gauge, as the proper legal method for that purpose, is in conformity both to the acts of Congress and to the usage of the government of the United States, for more than half a century.

It is apparent, therefore, that the duties now sought to be reclaimed, were paid upon brandies not actually imported, and, consequently, that they were not imposed by law. If, therefore, the petitioners be not entitled to relief, it is not because they have not paid the United States money which the acts of Congress did not require them to pay, but because they paid it under such circumstances as took from them the right to require its repayment.

Prior to the act of March 3, A. D. 1839, an importer might maintain an action for the recovery of an excess of duties, or for the recovery of duties illegally exacted, against a collector in two classes of cases: 1st. Where the payment was made for unascertained or estimated duties; and 2d, where it was made under protest. These two classes are distinctly recognized by Daniel, J., in the opinion delivered by him for the majority of the court, in the case of *Carey vs. Curtis*, (3 How. R., 241.) He said: "It will be remembered that the two principal cases in which collectors have claimed the right to retain have been those of unascertained duties, and of suits brought, or threatened to be brought, for the recovery of duties paid under protest. It is matter of history, that the alleged right to retain on these *two* accounts had led to great abuses and to much loss to the public; and it is to these *two* subjects, therefore, that the act of Congress particularly addresses itself. Again: "Besides the litigation spoken of, and which is said to lead to this result, is a litigation for duties paid under protest, and not for over payment of unascertained duties."—(3 How. R., 243.) Again: "Independently of this statute, the collector might have been sued for over payments on unascertained duties, as well as for duties paid under protest. And it can hardly be reconciled with reason or consistency that Congress designed to preserve the right of suit in the one case, and to deny it in the other. Yet, if these words have the force contended for by the defendant in error, they give the right of action against the collector for duties paid under protest only, leaving the party who has overpaid unascertained and estimated duties, no remedy but that of resorting to the Secretary of the Treasury."—(Ibid., 244.)

The effect of the act of March 3, A. D. 1839, was to take away the right of action against collectors in both these classes of cases.—(*Cary vs. Curtis*, 3 How. R., 236.) But by way of compensation to the importer for the loss of his remedy by action, this act made it the duty of the Secretary of the Treasury, whenever it should be shown to his satisfaction, that in any case of unascertained duties, or duties paid under protest, more money had been paid to the collector, or the person acting as such, than the law required should have been paid, to take the prescribed measures to have it refunded to the person entitled to the over-payment. It may be proper to remark at this point, (1,) that this act did not in any way affect, or propose to affect the *right*

of the party making an over-payment in any case therein mentioned, to repayment; and (2) that the power which it confers upon the Secretary of the Treasury is purely *administrative*, and in no sense *judicial*. If, therefore, under this act, an importer, in a case either of unascertained duties, or of duties paid under protest, paid to a collector more money than he was by law required to pay, but could not show to the satisfaction of the Secretary of the Treasury that he had done so, he was without any enforceable remedy; but, nevertheless, the action of the Secretary of the Treasury not being *judicial*, but merely *administrative*, the implied contract of the United States to refund to the importer, what had been taken or detained from him without authority of law, still remained, unsatisfied and undischarged.

Soon after the decision in the case of *Cary vs. Curtis* was made, the act of February 26, A. D. 1845, was passed. What changes in the law were effected by it? First, it restored *sub modo* the right of action against a collector in cases of duties paid under protest; and, second, it required the protest to be made in writing, and signed by the claimant at or before the payment of the duties, setting forth distinctly and specifically the grounds of objection to the payment thereof. It is as follows: "That nothing contained in the second section of the act, entitled 'An act making appropriations for the civil and diplomatic expenses of government for the year one thousand eight hundred and thirty-nine,' approved on the third day of March, one thousand eight hundred and thirty-nine, shall take away, or be construed to take away or impair, the right of any person or persons, who have paid, or shall hereafter pay money, as and for duties, under protest, to any collector of the customs, or other person acting as such, in order to obtain goods, wares, or merchandise, imported by him or them, or on his or their account, which duties are not authorized or payable, in part or in whole, by law; to maintain any action at law against such collector, or other person acting as such; to ascertain and try the legality and validity of such demand and payment of duties, and to have a right to a trial by jury touching the same, according to the due course of law. Nor shall anything contained in the second section of the act aforesaid be construed to authorize the Secretary of the Treasury to refund any duties paid under protest; nor shall any action be maintained against any collector, to recover the amount of duties so paid under protest, unless the said protest was made in writing, and signed by the claimant, at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof."—(5 Stat. at large, page 727.)

But that act is silent upon the subject of unascertained duties. It mentions only duties paid under protest. It is wholly inapplicable, therefore, to unascertained duties; and the rights of an importer, in reference to the latter, remained the same *after* as they were *before* the passage of that act.

The only remaining act of Congress at all connected with this subject is the act of August 8, A. D. 1846. The second section of that act is as follows: "That the Secretary of the Treasury be, and he is hereby authorized, out of any money in the treasury not otherwise appropriated, to refund to the several persons entitled thereto such sums of

money as have been illegally exacted by collectors of the customs, under the sanction of the Treasury Department, for duties on imported merchandise, since the third of March, eighteen hundred and thirty-three: *Provided*, That, before any such refunding, the Secretary shall be satisfied, by decisions of the courts of the United States upon the principles involved, that such duties were illegally exacted: *And provided also*, That such decisions of the courts shall have been adopted or acquiesced in by the Treasury Department as its rule of construction."—(9 Stat. at Large, p. 84.)

That statute has no application to unascertained duties. It, in terms, applies only to duties *illegally exacted*. Now, unascertained duties, in the strictest sense of those terms, certainly as applicable to a case like the one now under consideration, are not illegally exacted. There can be no illegality as respects them, except in the detention of the over-payment after the true amount of duties has been legally ascertained.

When an entry is made, the collector, jointly with the naval officer, or alone where there is none, is required by law to make a gross estimate of the amount of duties on the goods entered; and if the goods be entered for home consumption, and not warehoused, no permit will be granted for landing them until such estimated duties are paid.—(1 Stat. at Large, p. 664, § 49; 1 *Ibid.*, p. 673, § 62; 9 *Ibid.*, p. 53, § 1 ) And, if it be necessary, in order to ascertain the duties thereon, to weigh, gauge, or measure the goods, they cannot, without the consent of the proper officer, be removed from the place where they are landed, before they have been weighed, gauged, or measured; and if spirits, before the proof, or quality and quantity thereof are ascertained and marked thereon, by or under the direction of the proper officer for that purpose.—(1 Stat. at Large, p. 665, § 51 ) So far, therefore, from unascertained duties being duties illegally exacted, they are always demanded and paid in strict conformity to law. The very terms imply that duties are to some extent imposed and payable in the particular case, but that the true amount is unknown and undetermined at the time of payment. The law, in its requirements upon this subject, looks both to the security of the United States, and to the interests of the importer. The just demands of the United States are secured by the payment of the estimated duties, and the goods are liberated without any unnecessary delay, so that they may at once go into the possession of the importer and enter into his business. But the object, as regards the United States, is to secure their just demands, and nothing more; and the payment is made under an implied contract on the part of the United States that the excess, if any, beyond the amount of duties actually imposed by law, shall be refunded to the importer. There can be no doubt, then, that, in the legal sense, unascertained duties are never illegally exacted, and, consequently, that the second section of the act of August 8, A. D. 1846, does not apply to them.

According to these principles the case under consideration is in its nature a case of unascertained duties; but it is insisted on the part of the United States that, at the time when the importations which it embraces were made, the duties thereon, under a regulation of the

Treasury Department, were required to be computed on the invoice quantity, and that the duties in question were, therefore, ascertained at the time of their payment. Without pausing to inquire whether the consequence deduced from this regulation would necessarily have followed, it is sufficient to remark that the regulation itself was in conflict with law and invalid.—(*Marriott vs. Brune*; *The United States vs. Southmayd*; *Lawrence vs. Caswell*.) “The Secretary of the Treasury is bound by the law, and although in the exercise of his discretion he may adopt necessary forms and modes of giving effect to the law; yet neither he nor those who act under him can dispense with or alter any of its provisions. It would be a most dangerous principle to establish, that the acts of a ministerial officer, when done in good faith, however injurious to private rights and unsupported by law, should afford no ground for legal redress.” *Per* Mr. Justice McLean, in *Tracy vs. Swartwout*, 10 Peters R. 95: “Any instructions from the Treasury Department could not change the law.” *Per* Mr. Justice Thompson, in *Elliott vs. Swartwout*, 10 Peters R., 153: “The various circulars from the Treasury Department which have been referred to, and which have been construed in some cases to permit the deduction of the quantity not really arriving in this country, and in others to forbid it, are entitled to much respect in deciding on the true meaning of the revenue laws. But when contradictory or obscure, they furnish less aid and are *never* decisive or uncontrollable.” *Per* Mr. Justice Woodbury, in *Marriott vs. Brune*, 9 How. R., 634, 635: “The orders as well as the opinions of the head of the Treasury Department, expressed in either letters or circulars, are entitled to much respect, and will always be duly weighed by this court; but it is the laws which are to govern, rather than their opinions of them; and importers, in cases of doubt, are entitled to have their right settled by the judicial exposition of those laws, rather than by the views of the department.” And though, as between the custom-house officers and the department, the latter must by law control the course of proceeding, (5 Stat. at Large, 566,) yet as between them and the importer, it is well settled that the legality of all their doings may be revised in the judicial tribunals.—(*Tracey et al. vs. Swartwout*, 10 Peters, 95; *United States vs. Lyman*, 1 Mason, C. C., 504; *Opinions of Attorneys General*, 1015.) *Per* Mr. Justice Woodbury, in *Greely vs. Thompson*, 10 How. R., 234. The regulation of the Treasury Department referred to by the Solicitor cannot, therefore, have the influence or effect claimed for it in his argument. The duties in question here were in their nature, under the acts of Congress, unascertained at the time of their payment, and no regulation of the Treasury Department could deprive the petitioners of the right vested in them by law so to consider and treat them. The obvious reason is, that no such regulation can change the supreme law of the land.

This, then, being a case of unascertained duties, it was competent for the Secretary of the Treasury, under the act of March 3, A. D., 1839, which for this purpose is still in force, if it had been shown to his satisfaction that more money had been paid to the collector than the law required should have been paid, to have taken the measures prescribed by that act to have it refunded to the petitioners. But this,

the petitioners allege, he has refused to do, upon the grounds that no protest was made and that a portion of the claim was barred by the statute of limitations. The petitioners, therefore, are entitled to relief, unless the action of the Secretary of the Treasury is conclusive against them. We have already stated that the power of the Secretary of the Treasury under that act is purely administrative, and in no sense judicial. This is sufficiently obvious from the very terms of the act. It did not vest the Secretary of the Treasury with the power of deciding upon the rights of the claimant, except to the extent that he might be required to act upon them. It made it a condition precedent to the party's right to the Secretary's warrant upon the Treasurer for the overpayment, that he should satisfy the former that his claim belongs to one of the classes mentioned in the act, and was well founded. This mode of redress was thus conditioned and restrained, and for wise and good reasons. It would not have been either proper or politic to have authorized a payment out of the public treasury to a party whose rights had not been regularly adjudicated and legally ascertained, except upon the very condition imposed by the statute, that he should show to the satisfaction of the head of the Treasury Department that his case was one for which the statute meant to provide. It was not designed that he should obtain relief from a mere ministerial officer, unless his case was shown to be one on which such officer could act with entire safety to the public interests. If he failed to show such a case, then he failed to obtain the benefits of the statutory remedy; but it was not designed that his rights should be otherwise affected. The implied contract of the United States, in a case of unascertained duties, to refund the overpayment, would still continue in full vigor, the decision of the Secretary of the Treasury affecting merely his own official action and nothing more. It is no answer to this view that, in such a case, the party was without remedy, except by an appeal to the legislative department of the government; for if that were sufficient then there would be but few cases of contract of which this Court could take cognizance.

Let an order be made authorizing the taking of testimony in this case.

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SPENCE & REID, CONSIGNEE AGENTS OF MASON & TULLIS, *vs.* THE UNITED STATES.

[The petition of the claimants is hereto attached.]

Dissenting opinion delivered by Judge BLACKFORD.

I dissent from that part of the judgment in this case which sustains the present suit as to certain overcharged duties.

The duties in question were paid to the collector without a written protest setting forth the grounds of objection, and were afterwards paid by the collector into the treasury of the United States.

The decision of the Court is, that duties paid without such protest may be recovered back by a suit in this Court. That decision is, in my opinion, contrary to the act of Congress of 1845, chapter 22.

The dissenting opinions delivered by me in the cases of *Sturges, Bennett & Co., vs. The United States*, and of *Beatty vs. The United States*, are hereto attached, and made part of this opinion.

Mason & Tullis, for whose use this suit is brought, sued the collector in Baltimore for overcharged duties on the same pimento mentioned in the present petition. The circuit court of the United States decided in that case, that the suit was in substance a suit against the United States; and that "the money was in the treasury, and must be paid from the treasury if the plaintiff recover." They also decided that the suit would not lie, because there was no legal protest.—(*Mason & Tullis vs. Kane*, circuit court of the United States for the Maryland district, April term, 1851.) That decision is in direct opposition to the present decision of this Court in substantially the same case. The consequence of the judgment in this case is as follows: A merchant sues the collector in a circuit court of the United States for overcharged duties. The effect of the suit, if successful, is to obtain from the treasury of the United States the amount of those duties. But the suit fails for the want of a legal protest. The same merchant then turns round and sues the United States, in the Court of Claims, for the same duties, and recovers *without such protest*. One court decides that the treasury of the United States is liable upon the same state of facts on which the other decides that the treasury is not liable. It is impossible that these contradictory decisions can both be right.

The act of 1845 prescribes the condition upon the performance of which, and only upon such performance, a suit will lie for overpaid duties. That condition is, the making of a legal protest within the proper time. The policy of the act is very clear. It is noticed by Chief Justice Taney, in the following words: "Now the act of February 26, 1845, in express terms provides, that no action of this kind shall be maintained against a collector, 'unless the said protest was made in writing, and signed by the claimant at or before the payment of said duties, setting forth distinctly and specifically the grounds of objection to the payment thereof.'"

"It is not, therefore, sufficient to object to the payment of any particular duty or amount of duty, and to protest in writing against it. The claimant must do more. He must set forth in his protest the grounds upon which he objects, distinctly and specifically. And these latter words are too emphatic to be regarded as mere surplusage, or to be overlooked in the construction of this law. The object of this provision is obvious. In the multitude of collection offices in the United States, and the changes which so frequently take place in the offices, mistakes and oversights will sometimes take place, and irregularities in the assessment of duties. And the object of this provision is to prevent a party from taking advantage of such objection when it is too late to correct them, and to compel him to disclose the grounds of his objection at the time when he makes his protest. The case before the court strikingly exemplifies the policy of this provision. One of the objections is, that the merchant appraisers did not actually inspect the pimento. It was not actually looked at and inspected by these appraisers, because there was no controversy about its quality. The consignees had notice and appeared before the merchant ap-



praisers, and did not suggest that there was any defect in the quality which would lower the value, nor express a wish to have it inspected. They offered to prove that it was bought for the price at which it was invoiced, and that such was then the market price at the place where it was purchased. The appraisers were satisfied that it was bought at the price stated, but were of opinion that the price was lower than its market value in the principal markets of the island, and appraised its dutiable value accordingly.

"There is not the slightest reason to suppose that their assessment would have been, in any degree, influenced or changed by the actual inspection of the article. And if this objection had been stated in the protest, the error could have been immediately corrected before the duties were exacted; but it is now too late. And if this oversight be fatal to this appraisal, and renders it invalid, then the public lose, not only the enhanced duties to which the pimento was liable, but also the additional or penal duty which was the consequence of the merchant appraisal. The same may be said of the other grounds of objection above mentioned. If they had been set forth in the protest as the grounds of objection, and had been deemed tenable by the administrative department, the errors could have been corrected without the expense of litigation, and the duties which (the) law imposes secured to the public. And it is for this purpose that the act of 1845 requires the grounds of objection to be distinctly and specifically set forth in the protest. For this suit, although in form against the collector for doing an unlawful act, is, in truth and substantially, a suit against the United States."—(Mason & Tullis *vs.* Kane, above cited.)

That opinion shows very clearly that the said act of 1845 is founded in sound policy. But whether it be so or not, no court can repeal it. Whilst it is in force it must be obeyed.

The only argument in the present case made by the claimants, that appears to me to require an answer, is, that this suit is not against the collector, but is against the United States. That argument admits of a short and conclusive answer. It is this: The law is settled by said decision of the United States court, that a suit against the collector for overcharged duties is, in truth, a suit against the United States. So that, according to that decision, which is certainly correct, the mere fact that this suit is against the United States, and not against the collector, is no reason that the suit should be sustained.

I must be permitted to repeat here, what was said by me in *Sturges, Bennett & Co. vs. The United States*, namely, that the Supreme Court of the United States has decided that duties paid without a legal protest are not illegally exacted.—(Lawrence *vs.* Caswell, 13 How., 488, 496.)

When the claimants contend that the duties in question ought not to be retained in the treasury, they forget that those duties are so retained, not for the money involved, but in obedience to the statute of 1845, which Congress, for wise purposes, has thought proper to enact. They forget that, as regards the collection of duties on imports, Congress has the right to prescribe, by law, what rules it thinks proper; and that all persons who choose to import goods subject to duty, must conform to the rules which the law prescribes.

My opinion, therefore, is, that the petition shows no ground for relief

DAVID WOOD *vs.* THE UNITED STATES

Dissenting opinion delivered by BLACKFORD, J.

This is a suit for overcharged duties. The particulars of the claim will sufficiently appear from the following extract from the petition :

" Your petitioner respectfully represents, that during the years 1847, 1848, 1849, 1850, and 1851, he imported into the United States certain quantities of liquors in casks, on which importations duties were imposed and paid by him to the United States, not only on the value of the quantity of liquor, ascertained by gauge to be contained in the said casks when imported, but also on the value of the quantity of liquor which had leaked out of said casks on the voyage of importation ; which was lost ; which did not exist at the time when the duty was imposed ; which was not and could not be imported into the United States. Your petitioner claims a return of the moneys exacted from him as import duties on such leakage or non-imported liquors."

There is no allegation in the petition that any objection whatever was made to the payment of the said duties.

No evidence has been taken in the case ; and the only question now before the Court is, whether the petition shows a good cause of action. The decision of a majority of the Court is, that the petition is sufficient. From that decision I dissent. The ground of my dissent is, that the duties in question were paid without objection. The dissenting opinions heretofore delivered by me in the cases of *Sturgess, Bennett & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*, are referred to as a part of this opinion. In the examination of those cases I became entirely satisfied that the act of Congress of 1845, cited and relied on by me, was a bar to the claims ; and as I consider that act to be a bar in those cases, I, of course, consider it to be a bar in this case.

Since the judgment of the majority of the Court in the present case was rendered, I have met with a decision of the district court of the United States for the eastern district of Pennsylvania, which clearly shows that, even *before the act* of 1845, overcharged duties paid without objection could not be recovered back from the United States. Such payments made without objection are what the law denominates voluntary payments ; and the law is well settled that money so paid cannot be recovered back. This principle not only applies to the present case, but is also applicable to the aforesaid cases of *Sturgess, Bennett & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence & Reid vs. The United States*. The decision of the district court of the United States, above alluded to, is as follows :

An action was brought by the United States against Clement & Newman on a custom-house bond, dated 30th June, 1841, conditioned for the payment of \$793, that sum being part of the duties charged on an invoice of molasses imported by the defendants from Cuba into Philadelphia. The defendants claimed, among other things,

a set-off of \$345 22, being an alleged overcharge of duties previously paid by them. Mr. Watts, the district attorney, said in his argument that, though the amount claimed there was small, the principle involved the restoration of an immense sum—not only fifteen or twenty thousand dollars, before paid by those defendants, but millions to other importers throughout the United States, paid by them voluntarily and without protest. \* \* \* \* \* To the second credit the defendants ask for, we reply, first, that is covered by the same objections as the other; and, second, that the duties on which it is founded were paid voluntarily, and could not be recovered by the defendants, they having given no proof of compulsion or protest. Mr. Cadwalader, for the defendants, said: “Both our claims, for credit or set-off, rest on these reasons; but the second is met by the additional objection that it was a voluntary payment without protest, and is therefore not recoverable against the United States. We reply that there is evidence of a protest to go to the jury, and that it was not a voluntary payment. It was required as a preliminary to entry, and was exacted *colore officii*, and is therefore not voluntary, and may be admitted as a set-off.” The judge (27th of March, 1843,) charged the jury as follows:

“If the jury believe that the value of the sugar or molasses embraces all costs and charges at the place of exportation, including the costs of hogsheads, barrels, boxes, &c., necessary to enable the parties to export it, then it will be unnecessary further to consider the question; should they think otherwise, then a new question arises for their consideration, and that is, were the duties on this shipment paid voluntarily and without objection, in consequence of the parties mistaking the law. If they were so paid, they cannot be recovered back, or deducted from the claim of the United States. It has been argued that a payment to a public officer cannot be considered as a voluntary payment, as he holds the compulsory power in his own hands. This may be so, where the party paying objects, at the time of payment, to the propriety and legality of the charge. It is not necessary there should be a formal written protest, but there must be some objection, some notice that the claim is disputed, as the ground of objection or dispute may be removed or agreed to; but if paid without such objection, merely on a mistaken construction of the law, it is binding, and cannot be recovered back, or set off against another demand. Was there any such notice or objection by the defendants at the time of payment? The only evidence on their part is that of Mr. Newman, who says there was no formal protest, but Mr. Clement informed him there was a mistake in calculating the duties, and that he (Mr. Clement) had been talking to Mr. Kern about it. Mr. Kern, who was a deputy collector, is since deceased, his testimony was not taken in his lifetime, and no witness is produced who heard the conversation. On the other side, Mr. Howell, deputy collector; Mr. Martin, the cashier; Mr. Bell, the ascertaining clerk; and Mr. McAdam, the bond clerk, have all been examined, and each of them say they never heard of any complaint by the defendant; and Mr. Howell states, that if such a complaint had been made, it would have been within his peculiar duty to examine it; but he knows of none. Still, this is a

question of fact for the jury, and it is their province to decide it, the burden of proof being on the defendants. If you are satisfied that a duty was charged on the boxes, or hogsheads, over and above the value of the sugar, or molasses, at the time and place of exportation, and that such excess was paid by the defendants, they at the same time protesting or complaining against the justness or legality of the demand, then they are entitled to deduct the amount of such excess from the sum claimed in this suit. If, however, you believe that no excess was charged, or, if charged, that it was paid voluntarily, and without complaint, it is binding on the defendants, and they will not be entitled to the deduction." Verdict for the plaintiffs.—(*United States vs. Clement and Newman*, Crabbe's Reports, 499 to 515.)

In the case just referred to, as before stated, the United States were the plaintiffs and Clement and Newman the defendants. The defendants claimed, as a set-off, a certain sum as having been paid for overcharged duties. The court decided, in 1843, that if the duties had been paid without objection, the payment was voluntary, and could not be recovered back from the United States. That was the law, as said case decides, after the act of Congress of 1839, and before the act of 1835, relative to overcharged duties. When that decision was made, a verbal objection made at the time of payment was sufficient to enable the party to recover back from the United States, by way of set-off, overcharged duties. But by the act of 1845, no such recovery can be had, unless the objection was made in writing, and the grounds of the objection stated.

The above mentioned case of the *United States vs. Clement and Newman* was decided by a court of the United States, in which case the government of the United States was itself a party. The decision is entitled to great respect, and I cite it for the purpose of showing that, independently of the act of 1845, there is no foundation for the present claim as described in the petition. That decision is in direct opposition to the judgment of the majority of the Court in the present case.

The above are my reasons, in addition to those given in the cases of *Sturgess, Bennett & Co. vs. The United States*, *Beatty's Executor vs. The United States*, and *Spence and Reid vs. The United States*, for my dissent, in the present case, from the judgment of the Court.



IN THE SENATE OF THE UNITED STATES.

MAY 12, 1856.—Referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

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The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

JOHN ROBB *vs.* THE UNITED STATES.

1. The petition of the claimant.
2. Certificate of the Secretary of State, showing the dates of the appointments of the claimant as *Acting* Secretary of War.
3. Certificate of the Secretary of the Treasury, showing how long the claimant so acted.
- These two certificates are transmitted to the Senate.
4. Opinion of the Court on the case, with the opinion of the Court in Asbury Dickins' case annexed, with a bill for the claimant's relief.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this seventh day of May, A. [L. s.] D. 1856.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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*To the honorable the Judges of the Court of Claims:*

The petition of John Robb respectfully sheweth, that your petitioner, at the time hereafter mentioned, being chief clerk of the War Department, was appointed and duly commissioned to act as Secretary of War, at the following dates, to wit: June 8, 1832; July 16, 1832;

November 12, 1832; May 6, 1833; June 6, 1833, and September 26, 1833; and served, as well as he recollects, altogether about nine months under the appointments at the different periods above stated. Your petitioner further states that he presented his claim for payment at the Treasury Department for the services rendered as aforesaid, and that the First Auditor reported on the 10th of August, 1849, the sum of two thousand seven hundred and eighty-one dollars and ninety-four cents due from the United States to your petitioner for his salary, as Acting Secretary of War, for various periods during the years 1832 and 1833; but there was no further action upon the case by the Treasury Department.

The exact period of time which your petitioner served as aforesaid appeared from an official statement from the War Department, which, with other papers that accompanied the First Auditor's report, were lost or mislaid; and your petitioner asks that an order of Court be made to obtain from the War Department an official statement of the length of time he was Acting Secretary of War.

Your petitioner, having performed the duties of Secretary of War, believes that he is justly entitled to the salary for the time he acted as such, upon principles of equity, and precedents of the Treasury Department in similar cases; and that he is the sole owner of the claim, and prays that a bill be reported to Congress for his relief.

JOHN ROBB.

J. S. EDWARDS,  
A. H. LAWRENCE,  
*For petitioner.*

WASHINGTON COUNTY, }  
District of Columbia, } ss.

Personally appeared before me, a justice of the peace in and for said county, John Robb, who made oath that the foregoing petition contains the facts, according to his knowledge and belief.

Given under my hand this 16th July, 1855.

L. F. WHITNEY, JR.

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JOHN ROBB vs. THE UNITED STATES.

Opinion of the Court delivered by BLACKFORD, J.

This is a claim upon the United States for compensation for the services of the claimant as Acting Secretary of War, at different times, between the 8th of June, 1832, and the 9th of October, 1833, both days inclusive.

It appears by the evidence that the claimant was regularly appointed Acting Secretary of War, at various times in said years, as stated in his petition; and that he served in that office, in those years, for one hundred and seventy-five days. The petition states, that during the times those duties were performed the claimant was chief clerk in the War Department.

This case is the same in principle with that of *Dickins vs. The United States*, recently decided by this Court. The decision in that case, relative to the validity of the petition, is hereto attached. It shows the reasons of our decision in the present case.

We consider the claimant entitled for his services, as Acting Secretary of War, to the same compensation that was, at the times of his service, allowed by law to the Secretary of War—that is, at the rate of six thousand dollars a year. Such allowance is in accordance with the decision of the circuit court of the United States, in the case of the United States *vs. White* and others, cited in our opinion in the case of *Dickins vs. The United States*.

The account rendered by the claimant is as follows :

*“The United States to John Robb, Dr., for services as Acting Secretary of War.*

From	8 June, 1832, to 15 June, 1832, inclusive,	7 days.
“	16 July, 1832, to 6 Oct., 1832,	“ 82 “
“	12 Nov., 1832, to 17 Nov., 1832,	“ 5 “
“	6 May, 1833, to 8 May, 1833,	“ 3 “
“	6 June, 1833, to 8 Aug., 1833,	“ 64 “
“	26 Sept., 1833, to 9 Oct., 1833,	“ 14 “

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175 days.

At the rate of \$6,000 per annum, making \$2,876 73.”

We consider that account to be proved by the evidence ; and we therefore render judgment in favor of the claimant for the said sum of two thousand eight hundred and seventy-six dollars and seventy-three cents. A bill for that sum is accordingly reported.

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A BILL for the relief of John Robb.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury pay to John Robb the sum of two thousand eight hundred and seventy-six dollars and seventy-three cents, out of any money in the treasury not otherwise appropriated, as a compensation in full for his services as Acting Secretary of War, in the years eighteen hundred and thirty-two and eighteen hundred and thirty-three.*

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#### ASBURY DICKINS *vs.* THE UNITED STATES.

The opinion of the Court delivered by Judge BLACKFORD.

This is a claim for compensation for services performed by the claimant as Acting Secretary of the Treasury, at different periods, between the 24th of April, 1829, and the 31st of May, 1833, both days inclusive. It is also a claim for compensation for services performed as Acting Secretary of State, at different periods, between the 10th of August, 1833, and the 9th of November, 1836, both days inclusive.

The petition, which is hereto attached, states that the claimant



was appointed to said offices by the President of the United States, and rendered the services accordingly. It states, further, that during the times the claimant was acting as Secretary of the Treasury, he was also chief clerk in the Treasury Department; and during the times he was acting as Secretary of State he was chief clerk in the State Department.

The petition also states that the claimant's appointments of Acting Secretary of the Treasury were made on account of the absence from the seat of government, or sickness, of the Secretary of the Treasury; and that his appointments of Acting Secretary of State were on account of the absence or sickness of the Secretary of State.

The objection to the claim relied on in this case is founded on the ninth section of the act of Congress of 1818, entitled "An act to regulate and fix the compensation of the clerks in the different offices." That section is as follows:

"SEC. 9. *And be it further enacted*, That the compensation allowed by this act to clerks shall commence from and after the 31st day of March last. And it shall be the duty of the Secretaries for the departments of State, Treasury, War, and Navy, of the Commissioners of the Navy, and the Postmaster General, to report to Congress, at the beginning of each year, the names of the clerks they have employed, respectively, in the preceding year, together with the time each clerk was actually employed during the year, and the sums paid to each; and no higher or other allowance shall be made to any clerk in the said departments and offices than is authorized by this act. And all acts, and parts of acts, inconsistent with the provisions of this act are hereby repealed."—(3 Stat. at Large, 447.)

The meaning of that part of the above section relied on by the Solicitor is only this: That no such clerk as there referred to shall receive any other compensation, as clerk, than what the act allows. It does not affect the question, whether the claimant is not entitled, besides his salary as clerk, to a compensation, and, if any, to what amount, for his discharge of the duties of the other offices conferred on him?

The eighth section of the act of Congress referred to by the claimant is as follows:

"SEC. 8. *And be it further enacted*, That in case of the death, absence from the seat of government, or sickness, of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War Department, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such absence, or inability by sickness, shall cease."—(1 Stat. at Large, 281.)

It was under that law that the claimant received from the President the appointments authorizing him to perform the duties, respectively, of Secretary of the Treasury and of Secretary of State.

It appears to us that the petition shows that the claimant, at the

times he performed the duties of Secretary of the Treasury, held an office separate from his office of chief clerk; and that he also held an office separate from that of chief clerk at the times he performed the duties of Secretary of State. He held two offices at those times; and there was no law to prohibit him from doing so. He discharged the duties of both offices, and must be entitled to compensation accordingly. He does not claim any pay beyond his salary as chief clerk, for extra services. His claim for compensation, beyond his salary as chief clerk, is on account of his holding other offices at different times whilst he was chief clerk, and of his discharging the duties of such other offices.

The claim, we think, is well founded. There is the following decision on the subject, by the circuit court of the United States for the Maryland district. It was the case of a navy agent who had been appointed acting purser. Chief Justice Taney, in delivering the opinion of the court, uses the following language:

"But he is entitled to set off the sum of \$5,328 08, for his salary as acting purser to the naval establishment at Annapolis. The Secretary of the Navy had a right to appoint a purser *ad interim*, usually called acting purser, to discharge the duties of purser at this establishment, if the demands of the public service elsewhere, or any other sufficient cause, put it out of his power to employ a purser regularly appointed. The court is bound to presume that the power, in this instance, was exercised under circumstances that justified the appointment of the defendant as acting purser. He performed all the duties of purser at the naval establishment, settled his accounts with the proper officer at Washington as such, and not as navy agent; and was recognized as acting purser in the reports to Congress concerning certain expenditures chargeable to that branch of the service. The act of Congress fixes the salary of purser, when not otherwise provided for, at \$1,500 a year. As the defendant performed all the duties of the office, and performed them in the name and in the character of purser, he is entitled to the compensation which the law has provided for such services. The circumstance that he held the office of navy agent at the same time can make no difference. There is no law which prohibits a person from holding two offices at the same time. As a matter of policy it would certainly be highly objectionable in most cases as a permanent arrangement. But in the absence of any legal provision to the contrary this appointment was valid. Indeed, it often happens that in unexpected contingencies, and for temporary purposes, the appointment of a person already in office to execute the duties of another office, is more convenient and useful to the public than to bring in a new officer to execute the duty. And if the duties of the second office are performed, and the law has fixed the compensation which it deems just for such services, it cannot be material whether they are rendered by one holding another office or not, provided they are faithfully discharged."—(*The United States vs. White and others*, April term, 1851.)

That case is very similar to the one before us, and is, no doubt, correctly decided. It shows that the present claimant is entitled to receive for his services as Acting Secretary of the Treasury and as Act-

ing Secretary of State, the same compensation for the time he acted which the law then allowed to the Secretaries of the Treasury and of State, respectively.

The petition further states that, from the 21st of June to the 7th of August, 1831, the claimant received a compensation as Secretary of the Treasury ; but that during that time, he did not receive his salary as chief clerk. The circumstance here stated will be taken into consideration, when an account shall be taken from the evidence of the amount to which the claimant is entitled.

The Solicitor refers us to certain acts of Congress of 1839 and 1842, (5 Stat. at Large, 349, 510, 525.) It is only necessary to observe, with respect to these acts, that they were not in force when the services now sued for were rendered.

Testimony is ordered to be taken in this case.





IN THE SENATE OF THE UNITED STATES.

APRIL 2, 1856.—Referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States :*

The Court of Claims respectfully submits the following report in the case of

ASBURY DICKINS *vs.* THE UNITED STATES.

1. Petition of the claimant filed in this Court.
2. The briefs of the claimant and the Solicitor of the United States on the question of law arising on the petition.
3. The opinion of the Court thereon.
4. The memorial of the claimant to Congress and accompanying documents referred to the Court of Claims by the House of Representatives, March 3, 1855, attached to the report presented to the House.
5. The evidence exhibited by the claimant, also sent to the House of Representatives. A copy thereof sent to the Senate.
6. A statement showing the number of days Asbury Dickins served as Acting Secretary of the Treasury, and as Acting Secretary of State, and the amount allowed therefor, at the rate of \$6,000 *per annum*. Also the amount due him as chief clerk of the Treasury Department.
7. The opinion of the Court on the facts.
8. A bill to carry the decision of the Court into effect.

By order of the Court.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this first day of April, A. D. 1856.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*



## PETITION.

*To the honorable the Court of Claims :*

The petition of Ashbury Dickins respectfully sheweth :

That your petitioner held the office of chief clerk in the Treasury Department from the first day of April, eighteen hundred and twenty-nine, until the twenty-second day of August, eighteen hundred and thirty-three, and the office of chief clerk in the Department of State from the said twenty-second day of August, eighteen hundred and thirty-three, to the twelfth day of December, eighteen hundred and thirty-six.

That during the period your petitioner was chief clerk of the Treasury Department, he was, at various times, on occasion of the absence from the seat of government or sickness of the Secretary of the Treasury, authorized by the President of the United States, by appointments made under the eighth section of the act of Congress passed the eighth of May, seventeen hundred and ninety-two, entitled "An act making alterations in the Treasury and War Departments," to perform the duties of the office of Secretary of the Treasury, until the absence of the head of that department from the seat of government, or his inability from sickness had ceased. That during the period your petitioner held the office of chief clerk of the Department of State, he was, also, at various times, under the provisions of the same law, appointed by the President to perform the duties of the office of the Secretary during the absence or sickness of the Secretary of State. And that your petitioner performed the duties of chief clerk and head of the department, in each of the said respective departments, during the times he held the office of Acting Secretary of the Treasury and Acting Secretary of State, respectively, under the appointments made by the President as aforesaid.

That schedule A, hereunto annexed, which your petitioner prays may be taken as part of this his petition, contains a correct statement of the times of his appointments and the number of days during which, in the absence or sickness of the Secretary of the Treasury and Secretary of State, respectively, your petitioner performed the duties of head of those departments, respectively ; the period amounting in the whole to one hundred and thirty-three days during which he performed the duties of the office of Secretary of the Treasury, and two hundred and twenty-six days during which he performed the duties of the office of Secretary of State.

And your petitioner further shows, that he never received any compensation from the United States for the performance of the duties of said offices of Secretary of the Treasury and Secretary of State, as herein before specified, except for the performance of the duty of Secretary of the Treasury from the twenty-first of June to the seventh of August, eighteen hundred and thirty-one ; and, during this last mentioned time, he did not receive his salary as chief clerk in the Treasury Department, though he performed the duties of both offices. Your petitioner further shows, that his claim is for a reasonable compensa-

tion for services rendered to the United States under the laws thereof, by due authority from the President, for which he has never received any compensation. And your petitioner submits to this honorable Court, that, though no payment could legally be made to him at the treasury in compensation for his services rendered as Acting Secretary of the Treasury and Acting Secretary of State as aforesaid, without an appropriation by law, yet the performance of the duties of those offices temporarily, under legal and valid appointments for that purpose, (as the duties performed were not incompatible with his said office of chief clerk,) created an implied contract on the part of the United States to pay him a reasonable compensation for the services so rendered by him; and your petitioner is advised that the measure of reasonable compensation could not be less than a *pro rata* portion of the annual salary allowed by law to the Secretary of the Treasury and Secretary of State during the times your petitioner performed the duties of those offices, respectively.

And your petitioner further shows, that he first presented his claim for said services as Acting Secretary of the Treasury and Acting Secretary of State to the Treasury Department, in the year eighteen hundred and forty-nine, and that the account between your petitioner and the United States was examined and adjusted by the First Auditor on the eleventh day of August in that year, but has never, as your petitioner has been informed and believes, been acted upon officially by the First Comptroller, though your petitioner is informed and believes that the present Comptroller is opposed to the allowance of the account at the treasury; and your petitioner further shows that, in stating the said account, the Auditor omitted, for want of accurate information, some of the days and times during which your petitioner performed the duties of said offices of Secretary of the Treasury and Secretary of State as aforesaid. Your petitioner has annexed to this petition, as part thereof in the schedule marked B, the proceedings in the Treasury Department in reference to his said claim.

And your petitioner further shows, that, at the first session of the thirty-third Congress, your petitioner presented a petition for relief; and that a bill for his relief was reported in the Senate of the United States, at that session, by the Committee on Claims, and passed that body; and that during the same session, the said bill was reported favorably by the Committee of Claims of the House of Representatives, and placed upon the private calendar of the said House, and was, with other claims unacted upon, referred to this honorable Court, by a general order of the said House, made on the third day of March, eighteen hundred and fifty-five.

And your petitioner further shows, that, in his said petition to Congress, and in the said bill, which passed the Senate, the relief asked by and granted to your petitioner was the *pro rata* share of the salary allowed by law to the offices of Secretary of the Treasury and Secretary of State during the times your petitioner performed the duties of those offices, respectively, deducting the amount received by him as chief clerk during the same times. But your petitioner is advised that the more correct measure of compensation would be the salary of both offices, during the times he performed the duties of



both ; and that the same measure of compensation which would be applicable on the ground of implied contract on the part of the government to pay for services rendered as Acting Secretary of the Treasury or Acting Secretary of State where the appointment was made under the law of a person holding no office, would be equally applicable where the appointment to perform the duties was made of a person holding another office, not incompatible with the performance of the duties of those offices.

And your petitioner further shows, that he is the sole owner of the claim he has presented, and that no other person has any interest therein.

Your petitioner, therefore, prays this honorable Court that he may be allowed a reasonable compensation for services rendered to the United States, under authority of law by due appointments by the President of the United States, on the implied contract on the part of the United States to pay for those services what they were reasonably worth, and also his salary as chief clerk during that portion of time when he was paid for his services as Acting Secretary of the Treasury, but his salary as chief clerk was withheld, as hereinbefore stated.

ASBURY DICKINS.

WASHINGTON, July 6, 1855.

#### SCHEDULE A.

*Statement of the dates at which Asbury Dickins was appointed to perform the duties of Secretary of the Treasury during the absence from the seat of government or sickness of the Secretary of the Treasury; and also the duties of the Secretary of State during the absence from the seat of government or sickness of the Secretary of State, and the periods during which he acted under each appointment.*

##### 1. AS ACTING SECRETARY OF THE TREASURY.

Date of appointment.	Duration of service under it.	Number of days.
April 24, 1829.....	To the 26th of May, 1829, inclusive.....	33
June 21, 1831.....	To the 7th of August, 1831, inclusive...	48
October 18, 1831.....	To the 26th of Oct., 1831, inclusive.....	9
March 15, 1832.....	To the 30th of March, 1832, inclusive...	16
October 1, 1832.....	To the 10th of Oct., 1832, inclusive .....	10
November 8, 1832....	To the 17th of Nov., 1832, inclusive...	10
May 6, 1833.....	To the 9th of May, 1833, inclusive.....	4
May 29, 1833.....	To the 31st of May, 1833, inclusive.....	3
		133

## SCHEDULE A—Continued.

## 2. AS ACTING SECRETARY OF STATE.

Date of appointment.	Duration of service under it.	No. of days.
August 10, 1833.....	To the 24th of August, 1833, inclusive.	15
Nov. 11, 1833.....	To the 15th of Nov., 1833, inclusive.....	5
Oct. 11, 1834.....	To the 21st of Oct., 1834, inclusive.....	21
May 2, 1835.....	To the 13th of June, 1835, inclusive....	43
July 6, 1835.....	To the 13th of July, 1835, inclusive....	8
August 31, 1835.....	To the 8th of Sept., 1835, inclusive.....	9
Sept. 28, 1835.....	To the 19th of Oct., 1835, inclusive.....	22
May 19, 1836.....	To the 23d of May, 1836, inclusive.....	5
July 7, 1836.....	To the 29th of August, 1836, inclusive.	54
Sept. 27, 1836.....	To the 9th of Nov., 1836, inclusive.....	44
		226

## SCHEDULE B.

TREASURY DEPARTMENT, COMPTROLLER'S OFFICE,  
May 26, 1855.

DEAR SIR: In compliance with your verbal request, I herewith transmit to you copies of the papers on file in this office, relating to your claim for salary as Acting Secretary of the Treasury during the years 1829, 1832, and 1833, and as Acting Secretary of State during the years 1833, 1835, and 1836; also a statement of C. T. Jones, esq., acting Register of the Treasury, showing the days of said years on which warrants issued by the Treasury Department were signed by you as Acting Secretary. And I state that I have not been able to discover upon the records or files of this office, or on the files of accounts revised by this office, any evidence of the Comptroller's having made a decision upon said claim.

Yours, respectfully,

J. M. RAMSEY,  
*Acting Comptroller.*

ASBURY DICKINS, Esq.,  
*Secretary of the Senate.*

TREASURY DEPARTMENT, REGISTER'S OFFICE,  
August 10, 1849.

SIR: In reply to your letter of the 9th instant, I have to state that Asbury Dickins received his salary of \$2,000 per annum, as chief clerk in the office of the Secretary of the Treasury, from the 24th of April, 1829, to the 31st of May, 1833, excepting from the 21st of

June, 1831, to the 7th of August, 1831, inclusive, for which period he received salary as Acting Secretary of the Treasury, to the amount of \$784 40; that from the 10th of August, 1833, to the 9th of November, 1836, he received his salary as chief clerk in the office of the Secretary of State, and none other.

That John Robb received his salary as chief clerk in the office of the Secretary of War, at \$2,000 per annum, from the 8th of June, 1832, to the 5th of August, 1833, and no other.

I am, respectfully, your obedient servant,

ALLEN A. HALL, *Register*.

WILLIAM COLLINS, Esq.,  
*First Auditor*.

COMPTROLLER'S OFFICE,  
February 11, 1854.

This letter was found on William Anderson's desk, February 11, 1854. He could not find the original report of Auditor, No. 101,509. The copy herewith certified by Auditor Smith was received February 11, 1854.

E. M. W.

THE UNITED STATES,

*In account with Asbury Dickins,*

Dr.

For his salary as Acting Secretary of the Treasury, at the rate of \$6,000 per annum, during the following periods, viz:

From April 24 to May 26, 1829, inclusive, 33 days .....	\$543 95
March 15 to Mar. 30, 1832, " 16 " .....	266 66
Oct. 1 to Oct. 10, 1832, " 10 " .....	163 04
Nov. 8 to Nov. 17, 1832, " 10 " .....	163 04
May 6 to May 8, 1833, " 3 " .....	49 44
May 29 to May 31, 1833, " 3 " .....	49 44
	<u>1,235 57</u>

For his salary as Acting Secretary of State, viz:

From August 10 to August 24, 1833, inclusive, 13 days....	\$244 57
Nov. 11 to Nov. 15, 1833, " 5 " ....	81 52
August 31 to Sept. 8, 1835, " 9 " ....	146 74
Sept. 28 to Oct. 19, 1835, " 22 " ....	358 70
May 19 to May 23, 1836, " 5 " ....	82 41
July 7 to August 27, 1836, " 52 " ....	847 83
Sept. 27 to Nov. 9, 1836, " 44 " ....	717 39
	<u>2,479 16</u>

For salary as chief clerk in the Treasury Department from

June 21 to August 7, 1831, not heretofore paid..... 261 46

3,976 19

FIRST AUDITOR'S OFFICE,  
August 11, 1849.

The above account allowed in accordance with recent decisions of the First Comptroller of the Treasury, and approved by the Secretary.  
E. T. MONTAGUE.

The above I copied from paper sent by Mr. Dickins to find decisions referred to in certificate of Montague.

E. M. WHITTLESEY, *Clerk.*

FEBRUARY 11, 1854.

Correct copy :

JOHN Y. LAUB.

No. 101,509.]

TREASURY DEPARTMENT,  
*First Auditor's Office, August 11, 1849.*

I hereby certify that I have examined and adjusted an account between the United States and Asbury Dickins, and find that the sum of three thousand nine hundred and seventy-six  $\frac{19}{100}$  dollars is due from the United States to the said Asbury Dickins for his salary as Acting Secretary of the Treasury, Acting Secretary of State, and chief clerk of the Treasury Department, under previous decisions of the First Comptroller of, and approved by the Secretary of the Treasury, as follows, viz :

For his salary as Acting Secretary of the Treasury for various periods during the years 1829, '32, '33, per statement.....	\$1,235 57
For salary as Acting Secretary of State for various periods during the years 1833, '35, '36, per statement....	2,479 16
For salary as chief clerk of the Treasury Department from June 21 to August 7, 1831, not heretofore paid to him, per statement .....	261 46
	<hr/> 3,976 19

as appears from the statement and vouchers transmitted for the decision of the Comptroller of the Treasury.

WM. COLLINS,  
*First Auditor.*

\$3,976 19.

To the FIRST COMPTROLLER OF THE TREASURY.

COMPTROLLER'S OFFICE.

I admit and certify the above balance this ——— day of ———.  
—————, *Comptroller.*

To the REGISTER OF THE TREASURY.

I certify the foregoing is a true copy from the records of this office.  
T. L. SMITH,  
*Auditor.*

## IN THE COURT OF CLAIMS.

## IN THE MATTER OF THE CLAIM OF ASBURY DICKINS.

*Brief on behalf of the Petitioner.*

The petitioner founds his claim upon services rendered to the United States as Acting Secretary of State and Acting Secretary of the Treasury, at various times between the 24th of April, 1829, and the 27th of September, 1836, under appointments made by the President of the United States, by authority of the eighth section of the act of May 8, 1792, entitled "An act making alterations in the Treasury and War Departments."—(Statutes at Large, vol. 1, p. 281.)

No fact stated in his petition is denied on the part of the government, and the evidence rests in its own archives. In the absence of any such denial, for the purpose of deciding on the rights of the petitioner, his statement must be assumed to be true, and the only difficulty is in presenting any doubtful question of law on which his right to the relief he asks can be controverted.

Upon principles of universal justice, and upon the settled and unquestionable rule of the common law, services rendered by one person to another, at his request, create a just claim to compensation against the party to whom the services have been rendered. A promise will always be implied, where services are rendered upon request by A to B, without agreement as to compensation, to pay what the services are worth, and an action of *indebitatus assumpsit* will lie against the party to whom the services have been rendered.

The first question which may be presented is: Does any different principle obtain as to the right to compensation where the services are rendered to the State?

No distinction can be stated which justifies the application of a different principle; and it is submitted that no semblance of an authority in the shape of a judicial decision or dictum recognizes any distinction.

Between individuals, where the agreement specifies the compensation as well as the service, the specific price is recoverable; and so in the case of the State, where the sum to be paid is specified in the law creating the office or authorizing the performance of the services, the legal as well as equitable obligation to pay exists. Undoubtedly, either in the case of a salary attached to a permanent or temporary office, or of services rendered under the authority of law, where no specific compensation is provided by the law which authorizes the performance of the services, the executive department, in our form of government, could make no payment without an appropriation by the legislature; but the equity and right of the individual to compensation would exist, though the appropriation, from accident, neglect, or misapprehension, might not have been made; and the right would be the same whether the amount to be paid had been specified in the law in the shape of an annual salary or fees, or left indefinite and dependent upon the value of the services rendered. Where the salary is specified, and the appropriation made, the salary is the measure of compensation; and where the services are rendered, and an appropriation made generally for the compensation for such services, the

*quantum meruit* is the only true and legal mode of payment. The only difference is that, in the former case, no discretion is left with the executive department, but, in the latter, the discretion exists to adjust the compensation within the limits of the appropriation, upon the basis of value received by the government. As just a claim would exist against the State for the unpaid residue where the appropriation was insufficient to pay for the services what they were fairly worth, as where the appropriation was insufficient to pay the amount of a fixed salary. The obligations of the State, upon any recognized principles of law or equity, would be equally strong in both cases—in the one to pay the sum it had expressly agreed to pay, and in the other to pay what it had agreed to pay by implied contract; that is, a fair equivalent for the services rendered under its authority. It is true that if the legislature refused to appropriate the requisite amount, the sovereign could not, under a well known rule of policy, be sued in his own courts; no payment could be enforced, and the claimant would be legally remediless. But in either case, whether the promise of the State was express to pay a fixed sum, or implied to pay what the service rendered at its request was worth, the right of the claimant would be equally violated by a refusal to appropriate, and the claim would remain valid in equity and justice. It is submitted that this Court was constituted for the purpose of determining, upon principles of equity and justice, all claims founded upon implied contracts with the government of the United States, as well as those founded upon express contracts, and that, in the case of a State as well as in that of an individual, an implied contract is as imperative in its obligation as an express contract.

Secondly, it may, however, be contended that as the petitioner was chief clerk in the respective departments in which he performed the duties of head of the department by due appointment at the time the services were performed, he is not entitled to payment for services so performed, though a person unconnected with the department, and performing the same services under the same authority, would have been entitled to compensation.

If this objection is presented, it can only be on the ground that the offices were incompatible; and if the objection is made, it rests with those who represent the government to show that incompatibility, and, consequently, the violation of law by the Executive in making the appointment. But there was no law which restricted the discretion of the President in the selection of the individual who was to perform the duties of the office of Secretary of State or Secretary of the Treasury in case of the temporary inability of the regular head of the department, from absence or sickness, to perform them. The discretion of the President was absolute under the act of 1792 as to the person to be appointed; and the relations which necessarily exist between the chief clerk of a department and its head peculiarly qualify him, in case of accidental temporary inability of the Secretary, to supply his place. It is one of those cases in which, to use the language of Chief Justice Taney, "it often happens that in unexpected contingencies, and for temporary purposes, the appointment of a person already in office to execute the duties of another office is more

convenient and useful to the public than to bring in a new officer to execute the duty."—(U. S. *vs.* White *et al.*, C. C. U. S., Maryland district, per Taney, C. J., manuscript, pp. 3, 4.)

Indeed, the question is not worth an argument, as the intellect, or even the imagination, may be tasked in vain to point out any incompatibility in the duties of the chief clerk of a department which disqualifies him for the temporary performance of the duties of head of the department. The offices, however, are distinct, and the incumbent of the one is under no obligation to perform the duties of the other. The duties are essentially different, and a separate salary is by law attached to each. It was not as chief clerk that the petitioner performed the duties of head of the department. In the exercise of the discretion which the law specially authorized, the President invested him, though chief clerk, with a separate and independent office, and it was under that appointment, and in that independent office, he acted. Congress might, undoubtedly, have provided by law that, in the event of the sickness or absence of the head of a department, the chief clerk should, *ex officio*, perform his duties. But Congress had made no such provision, and it no more devolved upon the chief clerk *virtute officii* to perform the duties of the office of Secretary of State, in case of temporary disability of that officer, than it did upon the head of any other department or any other officer. Indeed, without an appointment by the President under the act of 1792 the chief clerk could not legally act as Secretary of State. It cannot, therefore, be objected to the claim of the petitioner that the performance of the duties for which he claims compensation was incident to his office of chief clerk.

It may possibly be contended, however, that since the passage of the acts of August 23 (sec. 2) and 26, (sec. 12,) 1842, and that of March 3, (sec. 4,) 1849, the chief clerk of a department performing the duties of acting Secretary of the department under the appointment of the President would not be entitled to any other compensation than his own regular salary as chief clerk. This might be admitted without touching the merits of the present claim, as *all the services of the petitioner for which he claims compensation were performed previously to the passage of those acts.*

If, with a view to prevent personal favoritism, or the holding of sinecure offices, Congress has by those laws, or either of them, prohibited the allowance of any compensation to a clerk or other officer in a department who performs the duties of any other officer in addition to his own, however wise such provisions may be for the future, they are not retrospective, and it would be gross injustice to give them *judicially* a retrospective operation.

It has been previously observed that it was no part of the petitioner's duty as chief clerk, nor could it, without express legal provision to that effect, be incident to his office of chief clerk, to perform, as such, the duties of head of department. It is not, therefore, any additional or extra pay as *chief clerk* that he claims, but the compensation justly due to him for performing the duties of a *separate and independent office*, to which he was appointed by the President by virtue of law. In support of the claim, he cites the following extract

from an official opinion given by Mr. Wirt, Attorney General of the United States, on a claim of General Cass when governor of Michigan:

\* \* \* "His salary is a compensation for his services as governor; but the services for which he claims do not belong to his duty as governor of the Michigan Territory, and, having been employed by the government to perform these services, he has a fair claim for them on the principles of a *quantum meruit*. The facts conceded, his right, I think, is undeniable."—(Opinions Attorneys General, vol. 2, p. 189.)

The petitioner cites, also, the official opinion of another Attorney General, Mr. Legaré, who, in relation to a claim of Mr. Young, then chief clerk of the Treasury Department, for performing services exactly like those for which the petitioner claims, said: "In the matter of Mr. Young's claim, I am of the opinion that the Secretary of the Treasury *ad interim*, appointed by virtue of an express law, has a claim upon the government for the usual, or, if there be no usual, for a reasonable compensation for his services in that capacity; but I do not think he can obtain it without an appropriation by Congress for the purpose. *The act of 1839 is imperative to that effect.*"—(Opinions of Attorneys General, vol. 4, p. 122.)

This opinion of Attorney General Legaré covers the case of the petitioner. He admits the obligation upon the government to pay, but advises (what is conceded here) that the executive department could not pay a claim clearly valid without an appropriation. It is in this, as in other cases, the want of an appropriation, where a right exists, which calls for the interposition of the Court.

It was decided by Judge Story, in the case of the United States *vs.* Morse, (Story's Reports, vol. 3, p. 87,) that two offices, not incompatible, may be conferred on one person, and that he will be entitled to the compensation of both. A similar decision was made by Chief Justice Taney, in the case of the United States *vs.* White *et al.*, already referred to. In that case White, the defendant, had been regularly appointed navy agent, with a salary fixed by law. He was also appointed to discharge the duties, *ad interim*, of a purser in the navy, and performed the duties. His salary as acting purser was disallowed at the treasury under the acts of 1839 and 1842, because he was regularly in office as navy agent, under a compensation fixed by law. The Chief Justice adjudged that he was entitled to both compensations.

\* \* \* "There is no law," said the Chief Justice, "which prohibits a person from holding two offices at the same time." \* \* \* "Indeed, it often happens that in unexpected contingencies, and for temporary purposes, the appointment of a person already in office to execute the duties of another office is more convenient and useful to the public than to bring in a raw officer to execute the duty. And if the duties of the second office are performed, and the law has fixed the compensation which it deems just for such services, it cannot be material whether they are rendered by one holding another office or not, provided they are faithfully discharged."—(Manuscript opinion, pp. 3 and 4.)

Though the petitioner held the office of chief clerk while, by the President's appointment, he performed the duties of the office of head of the department, he performed faithfully all the duties of chief



clerk; and it may be well imagined that it was only by great exertions that he was able to perform, and did perform satisfactorily, the duties of both offices. It was justly said by Judge Story, in the case of the United States *vs.* Morse, already mentioned, that "the law adjusts, or intends to adjust, the measure of the compensation of every officer to the duties to be performed in that office, and not in another independent office."—(Story's Reports, vol. III, page 89.) It will not be contended by any one that the humble compensation of chief clerk was, or was intended to be, or *ought to be*, any compensation for performing, in addition, the duties of the far more important office of head of the department. And if not, the petitioner has performed the duties of Secretary of State and Secretary of the treasury *without compensation*. In the same case of the United States *vs.* Morse, where the Court had to decide upon apparently conflicting statute provisions in relation to certain officers of the customs, which the treasury had construed to deny compensation for more than one office, Judge Story said that, "where the provisions are loose or obscure, and admit of two interpretations, the construction ought to be favorable to the claims of the officer who performs the duties of two independent offices." This opinion of that wise and learned judge gives no countenance to the idea that the duties of a highly important and responsible office are to be performed *gratuitously*, because they happen to be performed by a person who receives compensation for performing, also, the duties of another and inferior office.

In a late very elaborate opinion of the present Attorney General on the diplomatic and consular systems of the United States, (which opinion is sanctioned by the Secretary of State,) the law officer of the government recognizes in the following passage, and states with great perspicuity, the leading principle upon which the petitioner is entitled to relief: "Besides which an officer may lawfully be, and occasionally is appointed, either a statute officer or other, without any existing provision for his compensation; which, if he be lawfully appointed, creates a valid debt against the government."—(Pamphlet Opinion Attorney General Cushing, p. 30.)

The petitioner is not aware of any judicial decision or dictum which impugns the principles for which he has contended; and he submits to the Court, that, conceding the facts stated in his petition to be true, (and they are not denied,) both on principle and authority he is justly entitled to compensation on the implied contract of the United States to pay him for the performance of the duties of the office of Secretary of State and Secretary of the Treasury during the times specified in his petition, his services having been rendered at the request of the government under appointments made by the President by virtue of the act of 1792.

The only question which remains is the measure of compensation. The entire duties of the offices were performed by the petitioner while he was Acting Secretary of State and of the Treasury under his several appointments; and it is respectfully submitted, that, as these offices had a specific annual salary attached to them by law, the value of the services rendered in the discharge of their duties cannot, without questioning the estimated value as fixed by the legislative authority,

be deemed less than a *pro rata* portion of the salary of the office as then established.

The evidence of the petitioner's services is contained in the accompanying certificates from the Departments of State and of the Treasury. The opinions of Chief Justice Taney and Attorney General Cushing also accompany this brief.

ASBURY DICKINS.

WASHINGTON, *October 4, 1855.*

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IN THE COURT OF CLAIMS.—No. 30.

ON THE PETITION OF ASBURY DICKINS.

*Brief of the United States Solicitor.*

This is a claim for compensation for acting as Secretary of State and as Secretary of the Treasury, at various times during the absence or sickness of the Secretaries, and whilst petitioner was chief clerk in those departments.

It seems to be admitted, that since the acts of 1839, and of 23d and 26th August, 1842, a similar claim could not be sustained. The act of 1839 (5 Stat., 349) provides, "that no public officer in any branch of the public service, or any other person whose salary, or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation in any form whatever for the disbursement of public money or the performance of any other service, unless the said extra allowance or compensation be authorized by law."

The 12th section of the act of 26th August, 1842, (see page 525, vol. 5,) enacts, "that no allowance or compensation shall be made to any clerk or other officer by reason of the discharge of duties which belong to any other officer or clerk in the same or any other department; and no allowance or compensation shall be made for any extra service whatever which any clerk or other officer may be required to perform." But the act of 1818, (chap. 87, p. 445,) entitled "An act to regulate and fix the compensation of the clerks in the different offices," which was in force during the period for which compensation is now asked, is quite as explicit. After fixing the compensation for the chief clerks and others, it provides, in section 9, that "*no higher or other allowance shall be made to any clerk in the said departments and offices than is authorized by this act.*"

It may be said that this provision is not equivalent to those in the acts of 1839 and 1842, and that the Supreme Court, on allowing similar claims when presented as offsets, has not noticed the act now quoted, and given it the force I contend for. I have not found it quoted for the United States, I admit, by the attorneys of the United States in those cases, but it is cited by Mr. Haywood, in his report in Fillebrown's case.—(See Senate Doc. 28th Cong. 1st sess., No. 213, vol. 4.)

The legislation of Congress, which is reviewed in Hoyt's case, (10 Howard, 109,) shows a constant effort—to use the language of the court—"to cut up by the roots these claims by public officers for extra

compensation on the ground of extra services ;" and a conflict of opinion has existed to some extent between the courts and Congress on the subject, as illustrated by the cases in which the courts have decided that the officers were entitled to extra compensation, but which Congress has steadily refused to pay.

I am not disposed to deny to the present claimant any just right. His long and faithful public service in many responsible positions is well known to every one familiar with public affairs ; his qualifications for the positions he has held are shown by the remarkable fact that he has been retained at his different posts amidst all the political fluctuations we have witnessed in the last thirty years. But this circumstance, which is so honorable to his capacity and fidelity, illustrates the objection which I make to the claim, on the ground that the petitioner did not perform all the duties which belonged to the Secretaries whose desks he occupied temporarily. He was there merely to perform the routine duties of the office, but not as an adviser of the President in foreign and domestic policy. He was not probably engaged an hour longer in the day whilst secretary *ad interim* than as chief clerk. The real labor of the office was reserved to the Secretary when he should recover from sickness, perhaps caused by overtasking his faculties whilst at his desk, or return from his journey undertaken to recruit himself for his labors. He ought to be paid his salary, certainly. Few have filled these positions who have not earned all that is allowed ; and yet, if the Court allows this claim, they ought not to have received it.

M. BLAIR.

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ASBURY DICKINS *vs.* THE UNITED STATES.

The opinion of the Court delivered by Judge BLACKFORD :

This is a claim for compensation for services performed by the claimant as Acting Secretary of the Treasury, at different periods between the 24th of April, 1829, and the 31st of May, 1833—both days inclusive. It is also a claim for compensation for services performed as Acting Secretary of State, at different periods between the 10th of August, 1833, and the 9th of November, 1836, both days inclusive.

The petition, which is hereto attached, states that the claimant was appointed to said offices by the President of the United States, and rendered the services accordingly. It states, further, that during the times the claimant was acting as Secretary of the Treasury, he was also chief clerk in the Treasury Department, and during the times he was acting as Secretary of State, he was chief clerk in the State Department.

The petition also states that the claimant's appointments of Acting Secretary of the Treasury were made on account of the absence from the seat of government, or sickness, of the Secretary of the Treasury ; and that his appointments of Acting Secretary of State were on account of the absence or sickness of the Secretary of State.

The objection to the claim, relied on in this case, is founded on the 9th section of the act of Congress of 1818, entitled " An act to regu-

late and fix the compensation of the clerks in the different offices." That section is as follows :

"SEC. 9. *And be it further enacted*, That the compensation allowed by this act to clerks shall commence from and after the 31st day of March last. And it shall be the duty of the Secretaries for the Departments of State, Treasury, War and Navy, of the Commissioners of the Navy, and the Postmaster General, to report to Congress, at the beginning of each year, the names of the clerks they have employed, respectively, in the preceding year, together with the time each clerk was actually employed during the year, and the sums paid to each ; and no higher or other allowance shall be made to any clerk in the said departments and offices than is authorized by this act. And all acts, and parts of acts, inconsistent with the provisions of this act, are hereby repealed."—(3 Stat. at Large, 447.)

The meaning of that part of the above section relied on by the Solicitor is only this : That no such clerk, as there referred to, shall receive any other compensation, as clerk, than what the act allows. It does not affect the question whether the claimant is not entitled, besides his salary as clerk, to a compensation, and, if any, to what amount, for his discharge of the duties of the other offices conferred on him.

The 8th section of the act of Congress referred to by the claimant is as follows :

"SEC. 8. *And be it further enacted*, That in case of the death, absence from the seat of government, or sickness, of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War Department, or of any officer of either of the said departments, whose appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective officers, until a successor be appointed, or until such absence, or inability by sickness, shall cease."—(1 Stat. at Large, 281.)

It was under that law that the claimant received from the President the appointments, authorizing him to perform the duties, respectively, of Secretary of the Treasury and of Secretary of State.

It appears to us that the petition shows that the claimant, at the times he performed the duties of Secretary of the Treasury, held an office separate from his office of chief clerk ; and that he also held an office separate from that of chief clerk at the times he performed the duties of Secretary of State. He held two offices at those times, and there was no law to prohibit him from doing so. He discharged the duties of both offices, and must be entitled to compensation accordingly. He does not claim any pay beyond his salary as chief clerk for extra services. His claim for compensation, beyond his salary as chief clerk is on account of his holding other offices at different times whilst he was chief clerk, and of his discharging the duties of such other offices.

The claim, we think, is well founded. There is the following decision on the subject by the circuit court of the United States for the Maryland district. It was the case of a navy agent who had been ap-

pointed acting purser. Chief Justice Taney, in delivering the opinion of the court, uses the following language :

" But he is entitled to set off the sum of \$5,328 08, for his salary as acting purser to the naval establishment at Annapolis. The Secretary of the Navy had a right to appoint a purser *ad interim*, usually called acting purser, to discharge the duties of purser at this establishment, if the demands of the public service elsewhere, or any other sufficient cause, put it out of his power to employ a purser regularly appointed. The court is bound to presume that the power in this instance was exercised under circumstances that justified the appointment of the defendant as acting purser. He performed all the duties of purser at the naval establishment, settled his accounts with the proper officer at Washington as such, and not as navy agent ; and was recognized as acting purser in the reports to Congress concerning certain expenditures chargeable to that branch of the service. The act of Congress fixes the salary of purser, when not otherwise provided for, at \$1,500 a year. As the defendant performed all the duties of the office, and performed them in the name and in the character of purser, he is entitled to the compensation which the law has provided for such services. The circumstance that he held the office of navy agent at the same time can make no difference. There is no law which prohibits a person from holding two offices at the same time. As a matter of policy it would certainly be highly objectionable in most cases as a permanent arrangement. But, in the absence of any legal provision to the contrary, this appointment was valid. Indeed, it often happens that in unexpected contingencies, and for temporary purposes, the appointment of a person already in office to execute the duties of another office is more convenient and useful to the public than to bring in a new officer to execute the duty. And if the duties of the second office are performed, and the law has fixed the compensation which it deems just for such services, it cannot be material whether they are rendered by one holding another office or not, provided they are faithfully discharged."—(The United States *vs.* White and others, April term, 1851.)

That case is very similar to the one before us, and is, no doubt, correctly decided. It shows that the present claimant is entitled to receive for his services, as Acting Secretary of the Treasury and as Acting Secretary of State, the same compensation, for the time he acted, which the law then allowed to the Secretaries of the Treasury and of State, respectively.

The petition further states that, from the 21st of June to the 7th of August, 1831, the claimant received a compensation as Secretary of the Treasury ; but that during that time he did not receive his salary as chief clerk. The circumstance here stated will be taken into consideration, when an account shall be taken from the evidence of the amount to which the claimant is entitled.

The Solicitor refers us to certain acts of Congress of 1839 and 1842. (5 Stat. at Large, 349, 510, 525.) It is only necessary to observe with respect to these acts, that they were not in force when the services now sued for were rendered.

Testimony is ordered to be taken in this case.

A BILL for the relief of Asbury Dickins.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury pay to Asbury Dickins, out of any money in the treasury not otherwise appropriated, the sum of one thousand three hundred and ninety-five dollars and eighty-eight cents, for his services as Acting Secretary of the Treasury, at various times, between the twenty-fourth day of April, eighteen hundred and twenty-nine, and the thirty-first day of May, eighteen hundred and thirty-three, both days inclusive.

And also the sum of three thousand six hundred and ninety-three dollars and thirty-seven cents for his services as Acting Secretary of State, at various times, between the tenth day of August, eighteen hundred and thirty-three, and the ninth day of November, eighteen hundred and thirty-six, both days inclusive.

And also the sum of two hundred and sixty-one dollars and forty-six cents for his services as chief clerk in the Treasury Department, from the twenty-first day of June, eighteen hundred and thirty-one, to the seventh day of August, eighteen hundred and thirty-one, both days inclusive.

The said several sums of money are in full satisfaction to the said Asbury Dickins for his services as aforesaid.



IN THE SENATE OF THE UNITED STATES.

MAY 12, 1856.—Referred to the Committee on Claims.

DECEMBER 18, 1857.—Referred to the Committee on Claims and ordered to be printed.

The COURT OF CLAIMS submitted the following

R E P O R T .

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

MICHAEL NOURSE *vs.* THE UNITED STATES.

1. The petition of the claimant to the Court of Claims.
2. Claimant's petition to Congress, with accompanying documents, referred to the Court of Claims by the House of Representatives and returned to that House.
3. Statement showing the number of days the claimant acted as Register of the Treasury, transmitted to the House of Representatives.
4. Opinion of the Court in this case, with a bill for the relief of claimant.
5. Opinion of the Court in the case of Asbury Dickins *vs.* The United States.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the  
[SEAL.] seal of said Court at Washington, this seventh day of May,  
A. D. 1856.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

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*To the Honorable the Judges of the Court of Claims:*

The petition of Michael Nourse respectfully sheweth :

That prior to the 3d March, 1849, your petitioner being then chief clerk in the office of the Register of the Treasury, at several different periods was appointed Acting Register of the Treasury by the Presidents of the United States.

These appointments were made under the authority of the eighth



section of the act of 8th May, 1792, entitled "An act making alterations in the Treasury and War Departments."—(Stat. at Large, vol. 1, page 281.)

Your petitioner exhibits herewith the certificate of Mr. Hunter, Assistant Secretary of State, to show the date of his several commissions, and by whom the appointments were made; and the certificate of Finley Bigger, Register of the Treasury, to show the performance of the service under the several commissions.

The aggregate service prior to the 3d of March, 1849, was three hundred and forty-four days. This, at the rate of \$3,000 per annum, (the salary of the Register,) amounts to \$2,827 32. During the same time your petitioner received his salary as chief clerk, amounting to \$1,622 19.

Your petitioner presented his claim to the Senate, first session of the thirty-third Congress, a favorable report (No. 197) was made, and a bill for his relief passed the Senate, and in the House of Representatives was referred to the Committee on Claims. That committee reported unfavorably. The report was not acted upon in the House.

Your petitioner is advised there is justly due him from the United States compensation for these services; any he prays the judgment of this Court therefore.

Your petitioner is the sole owner of his claim, not having assigned it to any one else.

MICHAEL NOURSE.

DISTRICT OF COLUMBIA, }  
Washington County. }

Personally appeared before me, a justice of the peace in and for the county aforesaid, Michael Nourse, who made oath according to law that the facts stated in the annexed petition are true, to the best of his knowledge and belief.

PAUL STEVENS,  
*Justice of the Peace.*

JULY 17, 1855.

#### COURT OF CLAIMS.

MICHAEL NOURSE *vs.* THE UNITED STATES.

The petition is referred to for a statement of the case.

1. For the petitioner it will be contended: That one man may hold two offices, if not incompatible; there may be two incumbents in the same office; and a man holding two offices is entitled to the salary of each; and if there be two incumbents of the same office, each may be entitled to a salary.

The following authorities are referred to:

Viner's Abridgment, vol. 16, title "Officers and Offices," letter (C 2,) (C 3,) (C 4) letter R. Bacon, vol. 6, title "Offices," letter K, act of 1792.

Opinions of Attorneys General:

Mr. Attorney General Butler on Mr. Hunter's case, April 16, 1838, (Ho. Doc. 55, page 1182; Hall, vol. 3, page 324.) Mr. Attorney General Legaré on Mr. Young's case, November 26, 1842, (Ho. Doc. 1550; Hall, vol. 4, 122.) Mr. Attorney General Nelson on Hoffman's case, December 15, 1843, (Ho. Doc. 1664.) Mr. Attorney General Mason on Mr. Butler's case, August 3, 1846, (Ho. Doc. 1809.) Ditto on Andrew Porter's case, January 10, 1846, (Ho. Doc. 1776-'77; Hall, vol. 4, 464.) Mr. Legaré on Clerks district and Circuit Courts, (Ho. Doc. 1565-'66; Hall, vol. 4, 145.) Mr. Attorney Toucey, (contra,) March 1, 1849, (Ho. Doc. page 2141; Hall, vol. 5, page 74.)

Manuscript opinions of Judge Taney:

United States *vs.* M'Daniel, 7 Peters, 3; United States *vs.* Riply, 7 Peters, 9; United States *vs.* Fillebrown, 7 Peters, 29; United States *vs.* Gratiot, 15 Peters, 336; Milnor *vs.* Metz, 16 Peters, 221; United States *vs.* Morse, 3 Story, 87.

2. It will be contended that the laws of 1839 and 1842 do not affect this claim.

The act of March 3, 1839, 5 Statutes at Large, 349; 9th section of act of May 5, 1842, 5 Statutes at Large, 487; 4th section of act of March 3, 1849; vol. 9 Statutes at Large, 370, and the above authorities, will be noticed. Also the following items of receipts and expenses of 1849, page 15 of Civil List:

James Monroe, salary as Acting Secretary of State.....	\$2,069 44
Fletcher Webster, Acting Secretary of State.....	1,836 06
Wm. Jones, Acting Secretary of the Treasury.....	4,016 95
McClintock Young, Acting Secretary of the Treasury.....	4,199 80

Receipts and expenses for 1850, page 3 of Civil List:

Henry Dearborn, Acting Secretary of the Navy.....	1,296 20
S. L. Southard, Acting Secretary of War .....	2,194 91

3. Ought interest to be allowed on this claim? On this question the following authorities are referred to:

Sellock *vs.* French, 1st American Leading Cases, page 341, and note thereto, with authorities cited; Beau Marchais *vs.* Commonwealth, 3 Call, 107, marg. 123; Commonwealth *vs.* Cunningham & Co., 4 Call, 331; Attorney General *vs.* Turpin, 3 Hen. & Munf., 548; Res publica *vs.* Mitchell, 2 Dallas, 101; Attorney General *vs.* Cape Fear N. Co., 2 Iredell, Equity Rep., 444; Milne *vs.* Rem Publicum, 3 Yeates, 102; Auditor *vs.* Duggen, 3 Leigh, 241; Commonwealth *vs.* Newton, 1 Hen. & Munf., 89; United States *vs.* Joseph Nourse, 9 Peters, 9; act of May 15, 1820, 3 Statutes at Large, 593; United States *vs.* Wilkins & Wheat., 135.

S. S. BAXTER,  
*For Plaintiff.*

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#### MICHAEL NOURSE *vs.* THE UNITED STATES.

Opinion of the Court delivered by BLACKFORD, J.

The claimant claims compensation for his services as Acting Register of the Treasury, at different times, between the 16th of February, 1830, and May 12, 1847, both days inclusive.

The evidence shows that the claimant was regularly appointed Acting Register of the Treasury at various times between the dates aforesaid, and that he served in that office at various times between those dates, for three hundred and forty-four days. The claimant, during the times he served as Acting Register of the Treasury, was chief clerk in the office of the Register of the Treasury.

This case is the same in principle with that of *Dickins vs. The United States*, recently decided by this Court. The decision in that case, relative to the validity of the petition, is hereto attached. It shows the reasons for our decision in the present case.

The Solicitor, in opposition to a part of this claim, relies on the act of 1839, 5 Stat. at Large, page 349, section 3, and the acts of 23d and 26th of August, 1842, 5 Stat. at Large, page 510, section 2, and page 525, section 12. But we do not think that these acts apply to this case. They do not contemplate a case where the same person holds two distinct offices at the same time, which is the present case.

We consider the claimant entitled, for his services as Acting Register of the Treasury, to the same compensation that was, at the times of his service, allowed by law to the Register of the Treasury—that is, at the rate of three thousand dollars a year. Such allowance is in accordance with the decision of the circuit court of the United States in the case of *The United States vs. White and others*, cited in our opinion in the case of *Dickins vs. The United States*.

Annexed to this opinion are documents marked A and B, one of which is the statement of W. Hunter, Assistant Secretary of State, and the other, that of F. Bigger, Register of the Treasury. These documents prove the service of the claimant to have been rendered as aforesaid, for three hundred and forty-four days. The compensation due to him for that service, at the rate of three thousand dollars a year, is two thousand eight hundred and twenty-seven dollars and thirty-nine cents. Judgment is therefore hereby rendered for the claimant against the United States for the last named sum, and a bill for that amount is accordingly reported.

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A BILL for the relief of Michael Nourse.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury pay to Michael Nourse the sum of two thousand eight hundred and twenty-seven dollars and thirty-nine cents, out of any money in the treasury not otherwise appropriated, as a compensation in full for his services as Acting Register of the Treasury at various times between the sixteenth of February, eighteen hundred and thirty, and the twelfth of May, eighteen hundred and forty-seven, both days inclusive.

ASBURY DICKINS *vs.* THE UNITED STATES.

The opinion of the Court delivered by Judge BLACKFORD.

This is a claim for compensation for services performed by the claimant as Acting Secretary of the Treasury, at different periods, between the 24th of April, 1829, and the 31st of May, 1833, both days inclusive. It is also a claim for compensation for services performed as Acting Secretary of State, at different periods, between the 10th of August, 1833, and the 9th of November, 1836, both days inclusive.

The petition, which is hereto attached, states that the claimant was appointed to said offices by the President of the United States, and rendered the services accordingly. It states further, that during the times the claimant was acting as Secretary of the Treasury he was also chief clerk in the Treasury Department; and, during the times he was acting as Secretary of State, he was chief clerk in the State Department.

The petition also states, that the claimant's appointments of Acting Secretary of the Treasury were made on account of the absence from the seat of government, or sickness, of the Secretary of the Treasury; and that his appointments of Acting Secretary of State were on account of the absence or sickness of the Secretary of State.

The objection to the claim, relied on in this case, is founded on the 9th section of the act of Congress of 1818, entitled "An act to regulate and fix the compensation of the clerks in the different offices." That section is as follows:

"SEC. 9. *And be it further enacted*, That the compensation allowed by this act to clerks shall commence from and after the 31st day of March last. And it shall be the duties of the Secretaries for the Departments of State, Treasury, War, and Navy, of the commissioners of the navy, and the Postmaster General, to report to Congress, at the beginning of each year, the names of the clerks they have employed, respectively, in the preceding year, together with the time each clerk was actually employed during the year, and the sums paid to each; and no higher or other allowance shall be made to any clerk in the said departments and offices than is authorized by this act. And all acts and parts of acts inconsistent with the provisions of this act, are hereby repealed."—(3 Stat. at Large, 447.)

The meaning of that part of the above section, relied on by the Solicitor, is only this: That no such clerk, as there referred to, shall receive any other compensation, as clerk, than what the act allows. It does not affect the question, whether the claimant is not entitled, besides his salary as clerk, to a compensation, and, if any, to what amount, for his discharge of the duties of the other offices conferred on him?

The 8th section of the act of Congress referred to by the claimant is as follows:

"SEC. 8. *And be it further enacted*, That in case of the death, absence from the seat of government, or sickness, of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War Department, or of any officer of either of the said departments, whose

appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices, until a successor be appointed, or until such absence, or inability by sickness, shall cease."—(1 Stat. at Large, 281.)

It was under that law that the claimant received from the President the appointments, authorizing him to perform the duties, respectively, of Secretary of the Treasury and of Secretary of State.

It appears to us that the petition shows that the claimant, at the times he performed the duties of Secretary of the Treasury, held an office separate from his office of chief clerk; and that he also held an office separate from that of chief clerk at the times he performed the duties of Secretary of State. He held two offices at those times; and there was no law to prohibit him from doing so. He discharged the duties of both offices, and must be entitled to compensation accordingly. He does not claim any pay beyond his salary as chief clerk for extra services. His claim for compensation, beyond his salary as chief clerk, is on account of his holding other offices at different times whilst he was chief clerk, and of his discharging the duties of such other offices.

The claim, we think, is well founded. There is the following decision on the subject, by the circuit court of the United States for the Maryland district. It was the case of a navy agent who had been appointed acting purser. Chief Justice Taney, in delivering the opinion of the court, uses the following language:

"But he is entitled to set off the sum of \$5,328 08, for his salary as acting purser to the naval establishment at Annapolis. The Secretary of the Navy had a right to appoint a purser *ad interim*, usually called acting purser, to discharge the duties of purser at this establishment, if the demands of the public service elsewhere, or any other sufficient cause, put it out of his power to employ a purser regularly appointed. The court is bound to presume that the power, in this instance, was exercised under circumstances that justified the appointment of the defendant as acting purser. He performed all the duties of purser at the naval establishment, settled his accounts with the proper officer at Washington as such, and not as navy agent; and was recognized as acting purser in the reports to Congress concerning certain expenditures chargeable to that branch of the service. The act of Congress fixes the salary of purser, when not otherwise provided for, at \$1,500 a year. As the defendant performed all the duties of the office, and performed them in the name and in the character of purser, he is entitled to the compensation which the law has provided for such services. The circumstance that he held the office of navy agent at the same time can make no difference. There is no law which prohibits a person from holding two offices at the same time. As a matter of policy it would certainly be highly objectionable in most cases as a permanent arrangement. But in the absence of any legal provision to the contrary, this appointment was valid. Indeed, it often happens that in unexpected contingencies, and for temporary purposes, the appointment of a person already in office to execute the

duties of another office is more convenient and useful to the public than to bring in a new officer to execute the duty. And if the duties of the second office are performed, and the law has fixed the compensation which it deems just for such services, it cannot be material whether they are rendered by one holding another office or not, provided they are faithfully discharged.”—(*The United States vs. White and others*, April term, 1851.)

That case is very similar to the one before us, and is, no doubt, correctly decided. It shows that the present claimant is entitled to receive for his services, as Acting Secretary of the Treasury and as Acting Secretary of State, the same compensation, for the time he acted, which the law then allowed to the Secretaries of the Treasury and of State, respectively.

The petition further states that, from the 21st of June to the 7th of August, 1831, the claimant received a compensation as Secretary of the Treasury; but that during that time he did not receive his salary as chief clerk. The circumstance here stated will be taken into consideration, when an account shall be taken from the evidence of the amount to which the claimant is entitled.

The Solicitor refers us to certain acts of Congress of 1839 and 1842.—(5 Stat. at Large, 349, 510, 525.) It is only necessary to observe, with respect to these acts, that they were not in force when the services now sued for were rendered.

Testimony is ordered to be taken in this case.

The evidence shows that the claimant was regularly appointed Acting Register of the Treasury at various times between the dates aforesaid, and that he served in that office at various times between those dates, for three hundred and forty-four days. The claimant, during the times he served as Acting Register of the Treasury, was chief clerk in the office of the Register of the Treasury.

This case is the same in principle with that of *Dickins vs. The United States*, recently decided by this Court. The decision in that case, relative to the validity of the petition, is hereto attached. It shows the reasons for our decision in the present case.

The Solicitor, in opposition to a part of this claim, relies on the act of 1839, 5 Stat. at Large, page 349, section 3, and the acts of 23d and 26th of August, 1842, 5 Stat. at Large, page 510, section 2, and page 525, section 12. But we do not think that these acts apply to this case. They do not contemplate a case where the same person holds two distinct offices at the same time, which is the present case.

We consider the claimant entitled, for his services as Acting Register of the Treasury, to the same compensation that was, at the times of his service, allowed by law to the Register of the Treasury—that is, at the rate of three thousand dollars a year. Such allowance is in accordance with the decision of the circuit court of the United States in the case of *The United States vs. White and others*, cited in our opinion in the case of *Dickins vs. The United States*.

Annexed to this opinion are documents marked A and B, one of which is the statement of W. Hunter, Assistant Secretary of State, and the other, that of F. Bigger, Register of the Treasury. These documents prove the service of the claimant to have been rendered as aforesaid, for three hundred and forty-four days. The compensation due to him for that service, at the rate of three thousand dollars a year, is two thousand eight hundred and twenty-seven dollars and thirty-nine cents. Judgment is therefore hereby rendered for the claimant against the United States for the last named sum, and a bill for that amount is accordingly reported.

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A BILL for the relief of Michael Nourse.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Secretary of the Treasury pay to Michael Nourse the sum of two thousand eight hundred and twenty-seven dollars and thirty-nine cents, out of any money in the treasury not otherwise appropriated, as a compensation in full for his services as Acting Register of the Treasury at various times between the sixteenth of February, eighteen hundred and thirty, and the twelfth of May, eighteen hundred and forty-seven, both days inclusive.

RESOLUTIONS  
OF  
THE LEGISLATURE OF OHIO,  
RELATIVE TO  
*Kansas affairs.*

JANUARY 27, 1858.—Ordered to lie on the table and be printed.

SENATE JOINT RESOLUTIONS RELATIVE TO KANSAS AFFAIRS.

*Resolved by the general assembly of the State of Ohio, That we still have entire confidence in the disinterestedness, the integrity, and the ability of the present Chief Magistrate of these United States, and that his administration commands our cordial, and undivided support.*

*Resolved, That we still adhere to, and reaffirm all the doctrines of the Cincinnati platform.*

*Resolved, That we regard the refusal of the Lecompton convention to submit the constitution framed by them to the bona fide people of that Territory as unwise, and unfortunate for the peace of that Territory, and we hereby declare it to be our unalterable judgment that every constitution of a new State, unless otherwise directed by the people, ought to be submitted to the bona fide electors of such Territory, for their approval or rejection.*

*Resolved, That our senators in Congress are hereby instructed, and our representatives are hereby requested, to vote against the admission of Kansas into the Union, under the Lecompton, or any other constitution that has not proceeded from the people by a clear delegation of power to the convention, to form and put in operation such constitution, without a further sanction of the people; or which has not been submitted to, and approved by a vote of the people.*

*Resolved, That the governor be hereby requested to forward to each of our senators and representatives in Congress a copy of these resolutions forthwith.*

WM. B. WOODS,  
*Speaker of the House of Representatives.*  
MARTIN WELKER,  
*President of the Senate.*

JANUARY 20, 1858.



appointment is not in the head thereof, whereby they cannot perform the duties of their said respective offices, it shall be lawful for the President of the United States, in case he shall think it necessary, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices, until a successor be appointed, or until such absence, or inability by sickness, shall cease."—(1 Stat. at Large, 281.)

It was under that law that the claimant received from the President the appointments, authorizing him to perform the duties, respectively, of Secretary of the Treasury and of Secretary of State.

It appears to us that the petition shows that the claimant, at the times he performed the duties of Secretary of the Treasury, held an office separate from his office of chief clerk; and that he also held an office separate from that of chief clerk at the times he performed the duties of Secretary of State. He held two offices at those times; and there was no law to prohibit him from doing so. He discharged the duties of both offices, and must be entitled to compensation accordingly. He does not claim any pay beyond his salary as chief clerk for extra services. His claim for compensation, beyond his salary as chief clerk, is on account of his holding other offices at different times whilst he was chief clerk, and of his discharging the duties of such other offices.

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duties of another office is more convenient and useful to the public than to bring in a new officer to execute the duty. And if the duties of the second office are performed, and the law has fixed the compensation which it deems just for such services, it cannot be material whether they are rendered by one holding another office or not, provided they are faithfully discharged."—(*The United States vs. White and others*, April term, 1851.)

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The Solicitor refers us to certain acts of Congress of 1839 and 1842.—(5 Stat. at Large, 349, 510, 525.) It is only necessary to observe, with respect to these acts, that they were not in force when the services now sued for were rendered.

Testimony is ordered to be taken in this case.

above indicated, for manufacturing cannon and arms suitable for the equipment of troops in the United States service; and from the easy access to Mobile, New Orleans, and Galveston, to any arrangement which may be deemed advisable for the establishment of a coal depot for the supply of war and mail steamers.

*Resolved*, That our senators and representatives in Congress be requested to urge this matter, at least, if possible to obtain an examination by the government; and that a copy thereof be sent to each of them by the governor of this State.

Approved January 19, 1858.

A. B. MOORE.

C. M. JACKSON,  
*Speaker of the House of Representatives.*  
J. M. CALHOUN,  
*President of the Senate.*

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1. The memorial states that there are inexhaustible fields of bituminous coal, found by *actual* experiment to be equal to any known in the United States for fuel, generating steam, the manufacture of iron, and other purposes.

2. Lime-rock, also iron ore to an indefinite extent, unsurpassed for its yield and the fineness of the iron made therefrom, and all crowned by a virgin forest.

3. These mines, commencing at the southern point on the Alabama and Tennessee Railroad, stretch away through the counties of Shelby and Jefferson, and other counties, over a vast extent of the State, underlying a large portion of the public lands within their limits.

Water power is abundant, and the country noted for its salubrious atmosphere and healthfulness.

4. The terminus of the above road rests upon the Alabama river, by which means they are brought into immediate proximity with the Bay of Mobile, and the Gulf of Mexico.

There is also a railroad from the capital of the State to Pensacola in progress, with every prospect of a speedy completion; and I feel assured that, at no distant day, a road will be extended to the mineral country.

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EXECUTIVE DEPARTMENT,  
*Montgomery, Alabama, January 22, 1858.*

DEAR SIR: In pursuance of the provisions therein contained, I herewith forward to your address the within memorial of the general assembly of this State.

I have the honor to be, your very obedient servant,

A. B. MOORE.

Hon. Messrs. FITZPATRICK and CLAY.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1858.—Referred to the Committee on Claims.

FEBRUARY 3, 1858.—Discharged and referred to the Committee on Foreign Relations,

The COURT OF CLAIMS submitted the following

**REPORT.**

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

**CLAIMANTS BRIG GENERAL ARMSTRONG vs. THE UNITED STATES.**

1. The petition of the claimants as amended.
2. Claimants' brief on petition, with Report No. 139, H. R.
3. United States Solicitor's brief.
4. Certificate of registry and other documents, marked A, B, C, D, E, F, G, exhibited by claimant, and transmitted to House of Representatives.
5. Opinion of the Court ordering testimony to be taken.
6. Depositions presented on the part of the claimant and transmitted to the House of Representatives.
7. Solicitor's brief on the facts.
8. Brief of S. C. Reid, jr., with report of the Senate Committee on Foreign Affairs, and brief of Charles O'Connor, counsel for claimants on re-argument.
9. United States Solicitor's brief on re-argument.
10. Opinion of Judges Blackford and Scarburgh adverse to the claim.
11. Judge Gilchrist's dissenting opinion.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Washington, this first day of February,  
[SEAL] A. D. 1858.

**SAM'L H. HUNTINGTON,**  
*Chief Clerk Court of Claims.*

## IN THE UNITED STATES COURT OF CLAIMS.

DISTRICT OF COLUMBIA, <i>City and County of Washington.</i>	{	The Claimants of the Brig General Armstrong <i>vs.</i> The Government of the U. States.
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*To the honorable the Judges of the Court of Claims:*

The petition of Sam. C. Reid, in behalf of himself and the owners, officers, and crew of the United States private armed brig General Armstrong, who were the original, and still are the present claimants in this case, respectfully represents:

That on the 26th and 27th of September, A. D., 1814, the United States private armed brig General Armstrong, commanded by Captain Sam. C. Reid, belonging to the port of New York, was destroyed by a large British fleet in the neutral port of Fayal, in the dominions of Portugal, in violation of the laws of nations. That the government of Portugal, immediately after the transaction, admitted her liability to this government, and called upon England for an apology and indemnification, which was unhesitatingly accorded. That the United States government, from the inception of this claim to the present day, has ever acknowledged the rights of the claimants as legal and just. That under the administration of General Taylor, a fleet was sent to Portugal and a peremptory demand made for this claim. That afterwards the government of the United States made a treaty with Portugal, whereby she compromised the rights of the claimants, and for a *bonus* agreed to refer the "Armstrong claim" to arbitration. That Louis Napoleon, the umpire, decided adversely to the claimants, and contrary to the law and evidence, and the facts in the case, and in violation of his oath as President of the Republic of France, the decision having been rendered by the "Emperor of France." That the treaty and agreement made with Portugal to arbitrate this claim was made without the knowledge, consent, or advice of the claimants, or their agent. That the government of the United States never protested against said award as being illegal, unjust, and contrary to the articles of the treaty in this case made with Portugal, although she was fully aware of the same.

That the government of the United States in making said treaty with Portugal, without the knowledge, advice, or consent of the claimants, assumed the responsibility, and undertook and promised to pay the claimants their justly recognized demands against Portugal, to wit: the sum of one hundred and thirty-one thousand and six hundred dollars, being the amount recognized by this government and demanded of Portugal.

That the facts herein contained all appear in the following documents, which are prayed to be filed herewith, and made a part of this petition, to wit:

No. 1. "The memorial to Congress of Sam C. Reid, jr."—(Sen. Mis. Doc. No. 14, 1st sess. 33d Congress.)

No. 2. "Message of the President of the United States," containing the correspondence, &c., from 1814 to 1844, in Sen. Doc. 14, 1st sess. 29th Congress.

No. 3. "Convention and treaty with Portugal."

No. 4. "Message from the President of the United States," containing correspondence, &c., between this government and Portugal, in Ex. Doc. No. 53, Ho. of Rep. 1st sess. 32d Congress.

No. 5. "Correspondence and awards of Louis Napoleon," in Ex. Doc. No. 24, Senate, 2d sess. 32d Congress.

No. 6. "Reports of committees in Senate and House of Representatives."—(1st sess. 33d Congress, No. 157 Senate, and 139 House of Representatives.)

No. 7. Debate on the bill in the Senate, in speeches of Hon. Messrs. Clayton, Brown, Bayard, Seward, Weller, Cass, and Houston.

Your petitioner further represents that the said claim was presented to the Congress of the United States on the 19th day of January, 1854, and referred to the Committee on Foreign Relations in the Senate. Said Committee, on the 10th day of March, 1854, reported in favor of said claimants; which said report and accompanying bill have been made parts of this petition. On the 26th day of January, 1855, the bill was ordered to be engrossed for a third reading, by a vote in the Senate of ayes 22, nays 17, which vote was afterwards reconsidered on the 16th February, 1855, and the bill ordered to lie upon the table, by a vote of ayes 24, nays 23.

Your petitioner further represents that the said claim having also been presented to the House of Representatives, the Committee on Foreign Affairs, to whom it was referred, reported in favor of the claimants on the 29th of May, 1854, which said report and accompanying bill have been made parts of this petition. That said bill for the relief of the claimants failed to be acted upon by the House of Representatives for the want of time, and was, by a resolution of that body, transferred to this honorable Court.

Therefore your petitioner prays that, in consideration of the premises, after investigation and argument herein, a bill be reported by this honorable Court for the relief of the owners, officers, and crew of the United States private armed brig General Armstrong, the claimants in this case, to the Congress of the United States, appropriating the sum of one hundred and thirty-one thousand six hundred dollars, to be paid to the said claimants, or to their legally authorized representatives, out of the treasury of the United States.

And, in duty bound, your petitioner will ever pray, &c.

SAM. C. REID, JR.,

*Agent and Attorney for Claimants.*

DISTRICT OF COLUMBIA, }  
City and County of Washington. }

Personally appeared before me, the undersigned, Sam. C. Reid, jr., one of the claimants in the above case, who, being sworn, made oath that the matters contained in the annexed printed statement are true, to the best of his knowledge and belief.

SAM. C. REID, JR.

Sworn and subscribed before me this 13th day of July, A. D. 1855.

W. P. WILLIAMS, *Notary Public.*

IN THE HOUSE OF REPRESENTATIVES, May 29, 1854.

Mr. JOHN PERKINS, jr., from the Committee on Foreign Affairs, made the following report :

*The Committee on Foreign Affairs, to whom was referred the memorial of Sam. C. Reid, jr., in behalf of the claimants in the case of the brig General Armstrong, respectfully report :*

That, after having carefully examined the historical facts, and the diplomatic correspondence between the United States and Portugal, referred to in the memorial, they fully concur in the conclusions arrived at by the report of the Committee on Foreign Relations of the Senate, made unanimously on the 10th March last, and adopt it as a part of this report.

The only question involved is, how far the acts of this government impose on it the obligation, under the facts and circumstances of the case, to redress the claimants ; and whether its failure to recover this claim from Portugal does not fix on it liability to indemnify them.

The general principles in the law of nations regulating the duties and obligations of a government towards its citizens, attach responsibility, in this case, to the United States.

The government of Portugal, immediately after the outrage was committed by the English fleet on the American brig, admitted her liability to the United States to indemnify the claimants, and called on Great Britain for an apology and indemnification, which was unhesitatingly accorded. Every administration of this government, from Mr. Madison's down to the present day, has admitted and asserted the rights of the claimants. After making a peremptory demand on Portugal, assisted by the presence of an American fleet in the river Tagus, the President instructed our chargé at Lisbon, Mr. James B. Clay, to refuse a proposition to arbitrate, and to say, "that no such course would, under the circumstances, receive his sanction ; and this for reasons too obvious to need enumeration." Portugal refused to comply with this demand, and Mr. Clay asked for his passports, and left the country. Afterwards, the Portuguese minister at Washington opened a correspondence on the subject, and continued to urge a reference of it to arbitration. Mr. John M. Clayton, Secretary of State, again resisted the proposition, and, in his letter of reply of April 30, 1850, said : "*The undersigned, in conclusion, is compelled to add, that, should the Portuguese government persevere in the refusal to adjust and settle what are believed to be the incontrovertible claims of American citizens upon that government, the only alternative left to the President will be immediately resorted to—the submission of the whole subject to the decision of the Congress of the United States, whose final determination as to the mode of adjustment will have all its appropriate influence upon the course of the Executive.*"

This determination of the President of the United States to sustain the claimants and the national honor, had been already declared by our minister at Portugal, with the strong expression that this govern-

ment would "*never compromise the dignity of the republic, nor abandon the just rights of his fellow-citizens, to attain any end.*"

This decision was considered final, and the case prepared for submission to the Congress of the United States. At this juncture, General Taylor died. The succeeding administration reversed the decision of General Taylor, assumed the responsibility, and accepted (without the knowledge or consent of the claimants) the proposition to arbitrate, under the *bonus* of a promise to pay all other reclamations made by this government against Portugal.

The *President* of the republic of France (Louis Napoleon) was chosen arbitrator. The claimants were refused permission to submit any arguments upon the facts of the case, and, after the lapse of more than a year, an award was made by the *Emperor* of France (Louis Napoleon) in favor of Portugal, in direct conflict with the law and the evidence.

The committee are of opinion that, under the circumstances, the claimants had a right to consider the repeated recognition by the different administrations of this government of the justice of their claim, and the determined action upon it by General Taylor, as carrying with it the force of a judgment in their favor, which a succeeding administration had no power to review and unsettle.

In the cases of *Pottinger* and *Spense*, (reported in the *Opinions of the Attorneys General of the United States*, vol. 1, p. 486,) the question arose, under John Quincy Adams' administration, how far the then Executive was "authorized to review and unsettle the acts of its predecessor." Mr. William Wirt, Attorney General of the United States, (October, 1825,) held that, "If it has such authority, the Executive which is to follow us must have the like authority to review and unsettle our decisions, and to set up against those of our predecessors; and upon this principle, no question can be considered as finally settled." "Hence, I have understood it to be a rule of action, prescribed to itself by each administration, to consider the acts of its predecessors conclusive, as far as the Executive is concerned. It is but a decent degree of respect for each administration to entertain of its predecessor, to suppose it as well qualified as itself to execute the laws according to the intention of their makers, and not to set an example of review and reversal, which, in its turn, may be brought to bear upon itself, and thus keep the acts of the Executive perpetually unsettled and afloat. In conversing with President Adams on this subject, I understood him to concur in the general rule of considering all acts of the preceding administration as final; and although partial injuries may now and then remain unredressed by the operation of this, in common with all other general rules, yet it is better to bear that partial evil, or leave it to legislative redress, than to introduce the more extensive and incalculable evils which must result from considering all the past acts of the past Executive as open to reconsideration and readjudication, at the pleasure of the individuals who were interested in them. And if a decision made in regard to these gentlemen eight years ago, during the Presidency of Mr. Monroe, is open to review and reversal, I do not see upon what principle of dis-



crimination we can refuse to review and reverse a decision made during the Presidency of Mr. Washington," &c.

Congress, under the Constitution of the United States, alone has power, in a large number of cases, to redress a gross and manifest injury done to a citizen. In England, in similar cases, the subject is permitted to institute suit against his government, before the ordinary tribunals of justice. In a late case of the kind, (*DeBode vs. Regina*), where a British subject claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French revolution, which had been the subject of a convention between England and France, (reported in 16th Eng. Com. Law and Equity Reports, p. 23,) the Lord High Chancellor used the following language: "It is admitted law, that if the subject of a country is spoliated by a foreign government, he is entitled to obtain redress from the foreign government through the means of his own government; but if from weakness, timidity, or any other cause, on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country."

The only ground on which the validity of this claim can be questioned is entirely technical in its character, and not to be enforced against the evident demands of justice. It is not a point of law that is to be decided, but a principle of national honor that is to be vindicated.

The gallant sailors who were attacked in the neutral port of Fayal, doubted not that they would be protected in their just rights by the full power of their government; and having had repeatedly, since, the approval of their conduct by the authorities of their country, your committee are of opinion that a stronger case for redress in equity could scarcely be made out, and therefore report the accompanying bill, and recommend its passage.

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IN THE SENATE OF THE UNITED STATES, *March 10, 1854.*

Mr. SLIDELL made the following report:

*The Committee on Foreign Relations, to whom was referred the memorial of Sam. C. Reid, jr., in behalf of the claimants in the case of the brig General Armstrong, praying indemnity, respectfully submit the following report:*

As appears by the official documents accompanying the memorial, the facts of this case are as follows: On the 26th and 27th of September, 1814, the American private armed brig General Armstrong, commanded by Captain Samuel C. Reid, while at anchor in the neutral port of Fayal, belonging to the dominions of Portugal, was attacked by the gun boats of a large British squadron, commanded by Captain Lloyd, in violation of the laws of neutrality. The squadron consisted of his Britannic Majesty's vessels the ship-of-the-line *Plantagenet*, of 74

guns, the frigate *Rota*, of 44 guns, and the brig *Carnation*, of 18 guns. The General Armstrong carried but seven guns and ninety men. After a defence unparalleled in the history of naval warfare, the Americans sustained a loss of but two killed and seven wounded, while the loss in killed and wounded on the part of the enemy was between two and three hundred. The squadron was detained ten days at Fayal in repairing damages. They were occupied three days in burying their dead. The sloops-of-war, the *Thais* and *Calypso*, which arrived a few days afterwards, were taken into requisition to carry home the wounded men. The latter sailed for England on the 2d, and the former on the 4th of October, 1814.

On the representations afterwards made of the facts of this case by the Portuguese governor of Fayal to his government, expressly charging the violation of the neutrality of this port, and the destruction of the American brig by the British commander, the prince regent of Portugal, on the 22d December, 1814, instructed his minister at London to demand an apology and indemnification from the English government for the outrage committed. The Marquis de Aguiar, the minister of foreign affairs of Portugal, in compliance with orders received from the prince regent, addressed a note to Mr. Sumpter, the American minister at Rio de Janeiro, dated December 23, 1814, informing him of the circumstances, and stated that "not a moment's delay ensued in causing to be addressed to the British minister at this court the note which is confidentially communicated by a copy to your lordship, at the same time that he has directed his minister in London to make the reclamation so serious an offence requires." The letter alluded to, addressed to Lord Strangford, minister plenipotentiary of Great Britain, is dated Palace of Rio Janeiro, December 22, 1814, and holds this language: "His royal highness, at the same time that he has directed his minister at the court of London to make the strongest representations before the prince regent of the united kingdom of Great Britain, and require satisfaction and indemnification, not only for his subjects, but for the American privateer, whose security was guarantied by the safeguard of a neutral port, orders it to be signified to his excellency Lord Strangford, that he may inform his government of the unfavorable impression which the conduct of that British commander has caused in the mind of his royal highness," &c.

On the 3d January, 1815, Mr. Madison, President of the United States, not being aware that Portugal had voluntarily admitted her liability to this government, caused Mr. Monroe, the Secretary of State, to make a formal demand on Portugal for the destruction of the brig General Armstrong, based upon the sworn protest of Captain Reid and nine of his officers, made before John B. Dabney, United States consul at Fayal. Mr. Monroe, in his letter of instructions to Mr. Sumpter, our minister at Rio de Janeiro, held this language: "The growing frequency of similar outrages on the part of Great Britain renders it more than ever necessary for the government of the United States to exact from nations in amity with them a rigid fulfillment of all the obligations which a neutral character imposes." "You are requested to bring all the circumstances of the transaction distinctly to the view

of the Portuguese government, and to state the claim which the injured party has to immediate indemnification."

No satisfaction or reply having been received from Portugal to this communication, the claimants, in January, 1817, brought their claim before Congress. The Naval Committee of the Senate, to whom it was referred, in denying the right of the claimants at that time to be indemnified by their own government for the loss sustained, expressly charged the breach of neutrality on the government of England, asserted the responsibility of Portugal to the claimants, and declared it to be the duty of this government to seek redress for the claimants, "by such means as it may deem expedient."

In 1818, on the 14th March, Mr. John Q. Adams, Secretary of State under Mr. Monroe, in a letter to the Portuguese minister at Washington, the Chevalier Corrêa de Serra, calling his particular attention to this claim, said: "Of the facts in this case there is and can be no question, having been ascertained not only by the statements of the injured parties, but by the official reports of your own commanding officer. It is hoped your government will, without further delay, grant to the sufferers by that transaction the full indemnity to which they are by the laws of nations entitled." It is here proper to state, that on the demand made by Portugal for indemnification and satisfaction, England promptly replied by an apology, and made reparation for the loss of Portuguese property occasioned by the firing of the British vessels, but refused to pay the claim preferred and demanded for the destruction of the brig General Armstrong.

From Mr. Monroe's administration up to the early part of the second term of General Jackson, a period of sixteen years, it appears that this claim became neglected and wholly overlooked by both governments. In the mean time the House of Braganza had removed from Rio de Janeiro to Lisbon. On 2d June, 1834, Mr. Louis McLane, Secretary of State, informed Captain Reid that "the situation of Portugal is such as to render the present an unsuitable time for presenting any claim, however just, upon the government. When the political affairs of that country become settled, your memorial will receive proper attention."

Mr. Dickins, of the Department of State, in his letter of instructions to Mr. Cavanagh, dated May 20, 1835, said: "The Portuguese authorities at that place having failed to afford to this vessel the protection to which she was entitled in a friendly port, which she had entered as an asylum, the government is unquestionably bound, by the law of nations, to make good to the sufferers all the damages sustained in consequence of the neglect of so obvious and acknowledged a duty."

On the 14th of April, 1840, Mr. John Forsyth, Secretary of State under Mr. Van Buren, in reply to the claimants, said that "Mr. Cavanagh's instructions (United States chargé at Lisbon) require him to urge the call upon Portugal whenever there is room for expecting a favorable result."

Under Mr. Tyler's administration, Mr. Webster, at the solicitation of the claimants, renewed this demand, and a reply, in writing, was

received from the Portuguese minister, Señor de Castro. In this communication, dated August 3, 1843, addressed to Mr. G. W. Barrow, chargé d'affaires of the United States at Lisbon, the liability of Portugal was for the first time denied, and it was boldly asserted that the Americans, and not the British, had first violated the neutrality of their port. This was the only written reply ever received from the government of Portugal, since the communication of the Marquis de Aguiar, a period of nearly thirty years.

Under the administration of General Taylor, negotiations with Portugal were renewed. Mr. John M. Clayton, Secretary of State, in his instructions, dated April 20, 1849, to Mr. G. W. Hopkins, chargé d'affaires of the United States at Lisbon, in speaking of the Armstrong claim as "the oldest case of wrong, and the most remarkable," and in alluding to the wrongs and grievances so long borne by our countrymen, says: "It is under these circumstances that the President has resolved to make one more attempt to procure satisfaction for American claimants, and to assert the national honor. You will impress upon Portugal this idea, that, on entering upon the duties of his high office as Chief Magistrate of the United States, the President determined that he would assert the rights of his fellow-citizens upon foreign governments, proceeding upon the principle, often avowed by our government, 'to make no demand not founded in justice, and to submit to no wrong.' Further delay will be construed into denial. It is in contemplation to lay before Congress the result of this final appeal at an early period of the next session. Should it happen, unfortunately, that a satisfactory answer be denied, or withheld, until the arrival of the period for making the proposed communication, the subject will then be submitted to that body as it shall at the time stand; and the Portuguese government may rest assured that any measures which Congress in their wisdom may decide upon, as due to our citizens and country, will be faithfully carried out by the Executive." In carrying out these instructions, Mr. Hopkins, in his letter dated Lisbon, June 28, 1849, to Count Tojal, the Portuguese minister of foreign affairs, says: "The President of the United States sincerely desires to cultivate peace with every nation and people, but he will never compromise the dignity of the republic, nor abandon the just rights of his fellow-citizens, to attain any end."

Mr. James B. Clay, who succeeded Mr. Hopkins, continued the negotiation, and, in his letter of the 24th April, 1850, peremptorily refused to accept the proposition of Count Tojal to refer the case of the General Armstrong to the arbitration of a third power. In the final instructions sent to Mr. Clay by the Department of State, dated March 8, 1850, a peremptory demand was made on the Portuguese government, and twenty days allowed for a final reply. These instructions were sent to the commander of the American squadron in the Mediterranean, to be delivered to Mr. Clay, and the demand was backed by the presence of the American fleet in the river Tagus. In these instructions Mr. Clayton says: "In regard to a reference of our claims to an arbiter, which has been indicated, the President has directed me to say, that no such course will, under the circumstances,

receive his sanction, and this for reasons too obvious to need enumeration."

The letter of Count Tojal to Mr. Hopkins, dated Lisbon, September 29, 1849, states that "it is well known that the British government had already, in 1817, disapproved of the conduct of Commodore Lloyd, thereby giving satisfaction to his Majesty's government, and that it had, in March, 1818, made compensation for the losses occasioned to the inhabitants of Fayal by the artillery of the British forces, while absolutely refusing indemnity for the loss of the American privateer, on the grounds of her having been the first aggressor, and therefore the cause of her own destruction." Furthermore, Count Tojal states in his letter of March 9, 1850, to Mr. Clay, that "in 1814 the government of her Britannic Majesty, through Lord Bathurst, then minister of foreign affairs, directed Mr. Canning, ambassador at Lisbon, near the regency, to give the Portuguese government a verbal satisfaction for the occurrences which had taken place, and which resulted in the destruction of the privateer General Armstrong, in the port of Fayal," &c. And finally, that "in 1817, Lord Castlereagh, who was then minister of foreign affairs to her Britannic Majesty, sent the sum of £319 to the inhabitants of the village Da Horta, as a compensation for the damage which the balls of the brig *Carnation* had caused to their dwellings," &c. On Mr. Clay afterwards quoting these facts as conclusive evidence, both against the Portuguese and British governments, Count Tojal replies in his letter of May 15, 1850, that "the English government does not consider the conduct of Commodore Lloyd as amenable to censure; that upon being informed of its having been asserted, in the course of this correspondence, that Commodore Lloyd had been reprimanded by the government of his Britannic Majesty, on account of his conduct in the affair of the privateer General Armstrong, an official communication was sent, a few days ago, to the government of her most faithful Majesty, stating that the assertion in regard to such censures were entirely destitute of foundation." It is worthy of remark that the Portuguese government studiously concealed the diplomatic correspondence with England in regard to this whole transaction, although requested to exhibit it by Mr. Clay.

The government of Portugal, thus supported, aided, and encouraged by the government of England, continued to resist the payment of this claim, while she willingly admitted others of unequal justice and merit. Under these circumstances, on the 11th July, 1850, Mr. Clay, according to instructions, demanded his passports and left the country. In the mean time, the Portuguese minister at Washington, J. C. de Figanière é Morão, had opened a correspondence with the Secretary of State in relation to the Armstrong claim, urging a reference of the claim to a third power. Mr. Clayton rejected the proposition, and in his letter of the 30th April, 1850, says: "The undersigned, in conclusion, is compelled to add, that should the Portuguese government persevere in the refusal to adjust and settle what are believed to be the incontrovertible claims of American citizens upon that government, the only alternative left to the President will be immediately resorted to—the submission of the whole subject to the decision of

the Congress of the United States, whose final determination as to the mode of adjustment will have all its appropriate influence upon the course of the Executive." Again, on the 19th June, 1850, Mr. Clayton, in reply to Mr. Figanière's reclamations on this government, as a set off against this and other claims, says: "In conclusion, sir, I beg leave to repeat to you the assurance contained in my note of the 30th May last, 'that the just claims of the citizens of this country upon Portugal will lose none of the merit which characterizes them, nor any portion of that protection which this government has determined to extend to the claimants, by the resuscitation of such unfounded pretensions.'"

At this critical juncture, on the 9th of July, 1850, President Taylor died. On the formation of the new administration under Mr. Fillmore, the proposition of Portugal to submit this claim to a third power for arbitration was renewed, accepted, and agreed to, by this government, without the knowledge, advice, or consent of the memorialist, or any of the claimants. A treaty was concluded on the 26th February, 1851, and ratified by the Senate on the 10th March. This treaty was proclaimed on the 1st September, 1851. Louis Napoleon, President of the republic of France, was chosen as arbitrator. The claimants then submitted to the Department of State and filed a written argument, with the request that it should be transmitted to the arbitrator chosen by the high contracting parties. The Secretary of State, Mr. Webster, refused the application, on the ground that the terms of the treaty did not permit of it, and the claimants were deprived of the privilege, and debarred of the benefit of being heard, through their counsel and agent, in support of their demand. More than one year was permitted to elapse before any decision was made. The "prince president" had, in the mean time, become Emperor of France. On the 29th November, 1852, Mr. Rives, our minister at Paris, was informed by the French minister of foreign affairs, Mr. Drouyn de L'huy, that the arbitral decision of the prince president had just been rendered, and he would be immediately invited to wait on the prince president to receive the decision. On the 10th December, 1852, the French minister informs Mr. Rives that "circumstances not having permitted the 'emperor' to invite you to wait on him, he has done me the honor of deputing me to deliver, in his name, to the representatives of the two nations interested in the matter, the two documents destined for their respective governments." Mr. Rives, in his letter to Mr. Everett, Secretary of State, dated Paris, December 13, 1852, discloses the particulars of the formalities of receiving the award, and states, in conclusion, that "it may not be improper for me to add, that I never received, from any quarter, any intimation of the nature of the decision rendered; nor did the minister of foreign affairs, in the interview above mentioned, make the slightest allusion to its bearing on the one side or the other. He only said, in general terms, that the president had examined the whole subject with great care and attention, and with an earnest desire to render justice to the parties, according to the facts and principles involved in the controversy."

It is evident, from the letter of Mr. Rives, that he never was consulted or advised with, in regard to the rights of the claimants, nor was he invited or permitted, at any time, to appear before the "prince president," or "Emperor of France," to make any statement, or explain any fact or argument in behalf of the claimants in this arbitration.

Having thus narrated the facts of the case, the committee will now proceed briefly to state the views which have led them to the conclusion that the memorialists are entitled to relief. It is certain that, by a gross violation of the law of nations, the General Armstrong was attacked and destroyed, in the neutral harbor of Fayal, by a British squadron; that the outrage was, immediately after its occurrence, and when the facts were all fresh in the recollection of the authorities and inhabitants of Fayal who had witnessed it, made the ground of earnest and indignant remonstrance by the government of Portugal to that of Great Britain; that it was admitted and apologised for by the latter, and compensation made to such Portuguese subjects as had suffered by the collision. It appears to be conceded on all hands that the tolerance by a neutral of such a violation of its territory, renders it responsible to the government whose citizens have suffered by it, not only for apology and explanation, but for pecuniary indemnity; that such claim was made by the United States and urged for many years on Portugal; that its justice has been considered indisputable by all administrations; that even it was on one occasion intimated that it would, if denied, be enforced by arms; that, after many delays and evasions, Portugal offered to refer the claim to the arbitrament of a third power; that this offer was peremptorily rejected; that afterwards being renewed, accompanied by the bonus of a promise to pay the full amount of all other reclamations made by the United States, it was accepted, without notice to, or consultation of any kind with, the claimants, who, when it had once been rejected, had a right to presume that it would not be acceded to without their assent; and that they were not allowed the privilege of submitting an argument in the case. While a government is the sole judge of the circumstances under which a resort to arms should be had to secure reparation for injuries done to their citizens, and may abstain from a further prosecution of them, yet a manifest distinction exists between this right of abstinence and that of referring to arbitration. This power may be discreetly and rightfully exercised where various and complicated causes of complaint exist, and where the adjustment of none can be obtained without the submission of all to reference; and the citizen as to whom the decision may be unfavorable, although his claim be just, would probably have no valid equitable ground of recourse against his government.

The case of the General Armstrong was distinct and isolated; no other interests were hanging upon its decision; and if the administration of President Fillmore did not choose to urge it further, it might, and, in the opinion of this committee, should have been left for future settlement. Numerous instances in our own history during the last thirty years, to which it is not necessary to refer, demon-

strate the efficacy of time in bringing about the solution of difficulties apparently insurmountable.

The committee, while indisposed to speak in any other terms than those of unqualified respect of the judgment and impartiality of the arbiter to whom the case was referred, think that there is a manifest error in his statement of facts, and the conclusion drawn from his statement in the final award. He says: "Considering that, if it be clear, that on the night of the 27th of September, some English long-boats, commanded by Lieutenant Robert Fausset, of the British navy, approached the American brig the 'General Armstrong,' it is not certain that the men who manned the boats aforesaid were provided with arms and ammunition. That it is evident in fact, from the documents which have been exhibited, that the aforesaid long-boats having approached the American brig, the crew of the latter, after having hailed them and summoned them to be off, immediately fired upon them, and that some men were killed on board of the English boats and others wounded—some of whom mortally—without any attempt having been made on the part of the other boats to repel at once force by force."

Now, it is evident that the natural, indeed necessary, presumption is, that the boats of men-of-war do not, at night, closely approach an armed vessel of an enemy, without the crew being armed; those who assume the negative in such a case should prove it. But no stronger evidence can be required of the fact of the crews of the British boats being armed, than that a seaman of the General Armstrong was killed, and her first lieutenant wounded, in the first contest. Under all the peculiar circumstances of the case, the committee are of opinion that the claimants are justly entitled to relief on strict legal principles; and even were their convictions on the subject less decided than they are, they would find in the heroic conduct of Captain Reid and his gallant crew strong inducements to give them the benefit of their doubts.

There are two points of general interest involved in this matter, which should not be without their influence on the action of the Senate. The effect to be produced on our own citizens by according indemnity in stimulating them to emulate the noble example of Captain Reid; for there can be no doubt that if he had suffered himself to be captured without resistance, full pecuniary satisfaction would long since have been accorded by Portugal to the claimants. Shall we refuse it because he has added to our naval history one of its most brilliant pages? Again, if we act upon the avowed principle that our citizens are always to be compensated for any injuries they may suffer from the violation by belligerents of the law of nations, other countries will be more earnest in maintaining the inviolability of their territory.

The committee report the accompanying bill, and recommend its passage.



## ON PETITION OF SAMUEL C. REID AND OTHERS.

*Brief of the United States Solicitor.*

The petition asks payment by the United States for the destruction of the brig "General Armstrong" by a British fleet on the 27th September, 1814, at the port of Fayal, in the neutral territory of Portugal. Indemnity was demanded by Portugal of England at the time. Portugal having failed to procure it from England, demand was made on Portugal in 1835. Portugal refusing to pay, although earnestly pressed by the United States, it was finally agreed, by treaty concluded February 24, and ratified March 10, 1851, to submit the claim to arbitration. The King of Sweden was suggested by Portugal as the arbitrator, but the United States preferring the President of France, he was agreed upon as the arbitrator. On the 3d of November, 1852, he rendered an award in favor of Portugal, which the United States acknowledged as final and obligatory.

The claim is now urged against the United States on the ground: 1st. That the claim was improperly submitted to arbitration. 2d. That the treaty was so improperly and unskillfully framed, and the arbitration so negligently and improperly managed by the Secretary of State, that the claim was thereby lost before the arbitrator.

In support of this claim, the petitioners, by their counsel, have filed a brief, the points of which, to the number of thirteen, I proceed to state and consider.

*First point*—Charges that the Portuguese government acknowledged its liability to the United States, and cites the letter of the Marquis d'Aguiar, dated December 23, 1814, and enclosures, in support of this allegation.—(See p. 22, Senate Doc. No. 14, 1st sess. 29th Cong.)

It is true that the enclosed letter to Lord Strangford, the British minister, charges the British squadron with violating the neutrality of Portugal in destroying the "General Armstrong," and demands an apology and indemnity both for the inhabitants of Fayal and for the captain, crew, and owners of the "Armstrong," but it does not admit the liability of Portugal in any event.

*Second.* Every administration has admitted the right of the claimant. The evidence relied on to prove this is supposed to be contained in the letters of instruction of Mr. Munroe, January 3, 1815, p. 20; of Mr. Dickins, dated May 20, 1835, p. 23; Mr. Forsyth, October 2, 1835, p. 27; Do., July 2, 1836, p. 29; Do., September 21, 1836, p. 31; Mr. Webster, January 15, 1842, p. 40; Do., August, 1842, p. 42. Mr. Upshur, who succeeded Mr. Webster and Mr. Calhoun, who succeeded him, declined action on the claim. Now, with respect to these letters, it will be found that, with the exception of Mr. Webster, none of the Secretaries express an opinion on the justice of the claim *against Portugal*; none of them indicate any examination of the claim; and Mr. Webster, at page 4, merely says, he believes "its justness has not been denied;" and, at page 42, that the claim is "regarded as just by the government, and will not be relinquished under the objections heretofore made."

The first letter which instructs our minister to demand the indemnity from Portugal is that of Mr. Dickins in 1835. Mr. Monroe looked to Portugal to procure it from Great Britain; and the only expression in any letter, prior to 1835, from our officers, which seems to look to Portugal, is to be found in Mr. Sumter's letter of January 1, 1815, written without instructions from the State Department; and this expression is not *used as a demand*, but occurs in commenting on the letter of the the Marquis d'Aguiar, where he expresses his satisfaction at the "*indication*" it affords "of a resolution *to make* or procure satisfaction to the injured Americans."

And it is to be observed, in reference to this allegation, both with respect to the United States and with respect to Portugal, that it is by no means proper to attempt to conclude them by what has been said by their respective officers on the representations of the claimants, when acting on behalf of the claimant in endeavoring to procure indemnity for them from others.

Thus, with respect, first, to the Portuguese officials: The representations made by the Marquis d'Aguiar in his letter to Lord Strangford, in which he claims indemnity for the Americans on the ground that the British violated the neutrality of Portugal to destroy the American brig, and asserting, in strong terms, that the ground on which Captain Lloyd had justified himself at the time was a false pretence, were afterwards, when the claim was made against Portugal, set up to estop Portugal from denying that the British had been the aggressors; and now, when the effort is made to charge the government of the United States, the representations made by the Secretary of State and other official persons, in the effort to procure indemnity from Portugal, are set up as admissions of the rights of the claimants; and, upon such grounds alone, the advocates of the claim have felt themselves warranted in saying, that the award made by the French emperor was made in total disregard of the facts. But when it is remembered that at the several times when these representations were made by Portugal and by the United States, they were acting for the claimant and on his representations, and did not undertake to hear testimony and decide the points in advance of undertaking to urge the claim, they are not concluded by them at all when the claimant seeks in turn to make these governments responsible for his losses.

So far from being conclusive evidence, these statements, being nothing in fact but the representations of the claimant himself, are not evidence at all. But these statements, not written by any one having any knowledge of the facts, and altogether on the suggestions of the claimants and for their benefit, are not only sought to be made evidence, but evidence so irresistibly conclusive as to authorize the inference that the umpire who heard all the testimony committed a gross mistake in respect to the facts.

This conclusion is far from being justified by this or any other testimony which the claimant has offered. Even on the case which the claimant has chosen to present, it is manifest that the decision of the French emperor was in accordance with the facts and the law. In

the protest which Captain Reid made on the 27th September, 1814, at Fayal, he admits that he fired on the boats of the British on the suspicion that they were approaching his vessel for a hostile purpose—a suspicion he had no right to indulge, and which did not authorize the commencement of hostilities in a neutral port.—(See the case of the *Anne*, 3 Wheat., 435.) When it is considered, too, that the British commander declared at the time that the attack of the Armstrong was made “without the slightest provocation,” and “that the neutrality of the port which he had intended to respect had been thereby violated,” there is no doubt that the Armstrong was the aggressor. It became so, perhaps, under the honest conviction of the captain that the approach of the boats from the English squadron was made with a hostile purpose. But that circumstance alone was insufficient to justify him in proceeding to violence. The English squadron had the same rights in the harbor which he had, and might send their boats ashore at night without being subject to questions from him.

And when we have not only the statement of Captain Lloyd that the boats did not approach the brig with a hostile purpose, and the depositions of the officer in command and others in the boat, testifying positively that they approached without any hostile purpose, can we hesitate in believing that such was the fact, when not a single circumstance is related by the officers and crew of the brig which conflicts with this statement. It is, no doubt, true that Captain Reid thought otherwise; but his opinion cannot weigh against testimony not only positive on the point, but entirely unimpeached.

*Third.* Says prosecution of the claim renewed by Mr. Clayton and peremptory demand made.

*Fourth.* That when this was done, Portugal offered to pay all other claims *as a bonus* if the United States would consent to arbitrate this. This statement is repeated in the sixth point, and will be noticed under that head.

*Fifth.* That pending this negotiation Portugal made further admissions. That England interfered and furnished arguments.

The admissions are similar to those already considered. The interference of England was not improper. England was undoubtedly interested in the question. If decided against Portugal, and war was made to enforce it, she would be regarded as the cause of bringing on Portugal, a weak power, the vengeance of a strong one. She maintained that she had not done anything which justified this. The commandant of her fleet, against whom the charge was brought, repelled it. Could she stand by indifferently and see Portugal visited with war under such circumstances? On the other hand, could she see Portugal forced to pay, on the assumption that England was the aggressor, without being sensible that the world, under such circumstances, would expect her to reimburse Portugal, and that she would be in honor bound to do so. It is no discredit to England, therefore, that she has openly manifested an interest in the settlement of this question; nor does it show a want of amicable feeling towards the United States that she desired our Secretary of State to refer it to an arbitrator for settlement.

*Sixth.* On the death of President Taylor and the accession of Mr. Fillmore as President, with Mr. Webster the proposition to arbitrate was renewed and accepted, &c. That the payment of the other claims formed any part of the inducement or consideration for the agreement to submit the Armstrong claim to arbitration, is an allegation entirely unsupported by the treaty, or anything in the correspondence or circumstances which led to it.

*Seventh.* That the private agreement to arbitrate this claim was entered into without the consent of the claimants, and against their protest, &c.

It is true that Mr. Webster did not consult with the claimants as to what course he should take. He found, on entering office, that his predecessor had proceeded almost to extremities with Portugal in order to extort payment of this claim. Our minister had withdrawn from Lisbon, and notice given to Portugal that the correspondence would be laid before Congress, with the opinion of the President that the claim was withheld upon dishonest pretexts, and ask the action of Congress on the case, which was equivalent to asking the power of compelling payment. He (Mr. W.) did not approve the action of his predecessor. He concurred with Mr. Upshur and Mr. Calhoun, (see his letter, page 54,) that there was nothing in the circumstances of the case to justify such a course. What course should Mr. Webster have taken with these convictions? He could not properly proceed in Mr. Clayton's course. He could not suffer the existing relations to continue. He must keep in view the dignity of his government as well as the rights of the citizen. He could not, as it is now insisted, abandon the pretensions set up by his predecessor, and waive all further discussions of the subject which had brought about a suspension of diplomatic relations to some future time, and so renewed the diplomatic relations. Such a procedure would not have been consistent with the dignity of the government. It would have been, also, as full a recognition of the control of the government agency by the private citizen if Mr. Webster had desisted from doing what was proper to be done in his judgment, as if he had proceeded in the designs of his predecessor against his own judgment. When, therefore, the petitioner and his advocates disclaim all right on the part of claimants against foreign governments who have committed their claims to this government for prosecution to dictate the measures to be taken, but yet insist upon the right of controlling it so far as to be able to require the government to drop the claim rather than prosecute it in a way which does not meet the approbation of the claimant, it will be found, upon analyzing this proposition, that it is in fact the assertion, in another form, of the power which is disclaimed.

He did not, therefore, consult with the claimants, when he entered office, as to the course he thought proper to take to re-establish our amicable relations with a foreign government; and the Senate of the United States approved his course by ratifying the treaty. It was peculiarly proper to submit the claim to arbitration. Portugal had not wronged us. This question was one of naked legal liability, with no circumstance for complaint against her. Should the United States

have refused to submit such a question to a disinterested power, and used her superior force? But though it is, perhaps, immaterial, the objection that he not only agreed to submit this claim to arbitration without the consent of the claimants, but against their protest, is not sustained by the proof. The proof (see Governor Marcy's letter) shows, on the contrary, an acquiescence in this course; and a circumstance which is conclusive of this is dwelt on as the principal burden of complaint in the conduct of this business subsequently—that is, the offer of a written argument to be submitted to the arbitrator.

*Eighth.* That this treaty was submitted and ratified 10th March, without any possible knowledge of the circumstances, &c.; in proof of which Mr. Webster's letter of 19th March, 1851, to Mr. Hadduck, is cited, and Senate Doc. 7, 1st session 33d Congress. Captain Reid had notice of the proposed treaty in September, 1850. He had, therefore, all the time and opportunity necessary to make known his wishes.

The objections to the form of the treaty are frivolous:

1. The 2d article recites, as a reason for submitting *the claim* to arbitration, that the parties could not agree on a question of public law involved in it; *the claim* was to be submitted, not the question of law.

2. The objection, that the claim of the owners was not presented, is not well taken; because, the treaty refers the claim to arbitration, as presented by the American government, which included a claim for the vessel; and the award was pronounced upon a claim relative to the American privateer General Armstrong.

3. It is not necessary to specify that the arbitrator shall hear and decide upon the law and the facts which shall be submitted by the claimants through their government; that is implied from the office of arbitrator.

*Ninth.* That the government refused to forward the written argument of the agent of claimants, because there was no provision in the treaty for other argument than that contained in the correspondence. This refusal of the Secretary, and the absence of a provision for argument by the treaty, seems to have been the chief ground relied on by the advocates of the claim in the Senate against the United States. This objection proceeds on the ground that the party was denied a hearing, and it was asserted that it could only have been in consequence of this defect in the treaty, or of the erroneous construction of it, by which a hearing was denied the claimants, that the claim was lost, as the decision was so palpably against the weight of evidence. The misapprehension of the evidence I have already considered. If the court will compare the arguments in behalf of the claim, by Messrs. Hopkins, Clay, and other official personages, which were laid before the president of the French, with that presented by Mr. Reid to Mr. Webster, it will be perceived that nothing was lost in point of argument or good taste by suppressing Mr. Reid's production.

Whilst Mr. Webster's competence for his position is not questioned, it is insisted that, by entering into an arrangement by which the facts

and arguments developed in this voluminous correspondence were submitted to the arbitrator without further argument, he committed an error so gross as to entitle the citizen to have recourse to our government when the adverse decision was made, because it is insisted that if Mr. Reid's argument had been read by the French president, he would certainly have decided otherwise.

Mr. Bayard, at page 28 of the speeches in the Senate printed by the claimant, says: "In the diplomatic correspondence in reference to the transaction, can the honorable senator *point out to me any time when the Portuguese government took the ground that in point of fact the first aggression was committed by the General Armstrong?* No, sir—no. The attention of our own representatives was never called to such a thing. No such question of fact was ever made; no such investigation of the testimony was necessary, *because the government of Portugal never intended to assume such a ground;* but the emperor of France, on an unargued case, gets rid of the subject by assuming a matter of fact which the whole testimony goes to deny."—(See same remarks, p. 412, Congressional Globe, January 26, 1855.) It is surprising that the honorable senator to whom Mr. Bayard referred did not point out to him that the Portuguese government had not only insisted that the General Armstrong was the aggressor, but had maintained that position in every reply given to our demand upon her to indemnify the claimants, beginning with De Castro's answer in 1843, which is the first response made to the demand on Portugal.—(See the letter, p. 15, Doc. 53. See also Count Tojal to Mr. Hopkins, p. 33, September 29, 1849. Same to Mr. Clay, p. 49, March 9, 1850. Same to same, p. 56, April, 1850. Same to same, p. 61, May 15, 1850. Same to same, p. 75, July 6, 1850. Mr. Figanière to Mr. Clayton, April 27, 1850, p. 93. Same to same, July 9, 1850, p. 107.) The replies of Mr. Hopkins and Mr. Clay, to be found in this document, to the letters addressed to them, also show that this position was taken by Portugal, and the argument turns on that point in a great measure. It is therefore a great mistake to suppose that the French president decided the case on a new and unargued point, started after the correspondence was closed. It will be found also that Mr. Reid's argument, which Mr. Webster refused to send to France, adds nothing to those embraced in the protocol submitted to the emperor, which, it appears by letter to Mr. Haddock, included all the correspondence.

*Tenth.* That the arbiter chosen was the prince president, and before the award was delivered he became emperor, contrary to the treaty stipulations. The treaty merely stipulated for the reference to the "sovereign potentate or chief of some friendly nation who shall be chosen by the two high contracting parties."

The evidence shows that the award was rendered whilst Louis Napoleon was prince president, and the minister of the United States was notified of the fact during the presidency.—(See Senate Doc. No. 24, 32d Congress, 2d session.) The fact that copies of the award were not received till after the prince president had assumed a new title, cannot affect the validity of the award any more than if he had died

in the meantime, and the award had been certified by his successor in office.

*Eleventh.* Claimants protested when the award was made known to them; but Secretaries Everett and Marcy informed them that it was conclusive.

*Twelfth.* The award does not decide any question of public law, and therefore does not comply with the terms of the treaty. (This objection answered under point eight; see also thirteen.) Misstatements in the award, Portuguese arguments adopted, and inference that Portuguese had a hearing when denied to American, (require no answer.)

*Thirteenth.* Award contradictory. 1. Charges violation of neutrality on both belligerents. (This was true.) 2. Weakness of Portuguese power at Fayal, and Captain Reid's own resort to arms. These are two independent and distinct grounds for exempting Portugal from liability, which are not inconsistent with each other: One, that the local officers were not appealed to in proper time; and the other, that when appealed to they had not the power to protect the American brig.

The denial by the claimants, that the first aggression proceeded from the brig, has been considered above. But the fact stated and held to be equally conclusive by the award, that the weakness of the Portuguese garrison at Fayal rendered all armed intervention impossible, is recognized as true by Captain Reid in his protest.—(See p. 5, Doc. No. 14.) But whilst the fact is admitted, the law is controverted, and it is maintained that Portugal is bound to indemnify the owners, &c., of the brig, although they were unable to protect her.

This doctrine, asserted by Messrs. Hopkins and Clay and the claimants dogmatically, is unsustained by authority. Against it the Portuguese ministers, in the letters above cited, refer to numerous authorities, and maintain their position by great force of argument.—(See particularly Mr. Figanière to Mr. Clayton, p. 101, July 9, 1850. See also the speeches of Senators Fessenden, 404-'5, 645; Dawson, 409; Stuart, 403, in Congressional Globe, vol. 30; also, the speech of Senator Pearce, of Maryland, in vol. 31, p. 158, and quotations therein from Wheaton's Elements of International Law, directly in point.)

It is contended, also, that the duty of a neutral extends only to the institution and prosecution of proceedings for restoration of the specific property. Captain Reid having set fire to his own vessel, he put it out of the power of Portugal to institute any proceedings for this purpose, or in any way to try judicially the controversy as to the first aggression.—(See Wheaton's Elements, pp. 497-'8.)

On their own showing, it is plain that the claimants had no right to indemnity from Portugal.

If it were otherwise, and on the weight of the evidence now submitted, the court should be of opinion that the arbitrator, to whom the evidence on both sides was submitted, had decided against law and evidence, the award is nevertheless conclusive.—(Boston Water-power Co. *vs.* Gray, 6. Met. 131.)

Nor would it be less conclusive if the court should be of the opinion that the imputations upon Mr. Webster's management of the case

were well founded. The doctrine that the government must pay such individual losses as may be supposed to result from the incompetency, negligence, or bad management of officers in the conduct of public affairs, is inadmissible; no such pretension was ever set up before.— (See opinion of Attorney General Cushing, on application of the Peruvian government for indemnity for neglect of duty by marshal of California.) The allegation that the payment of the other claims was a *bonus* for the submission of this to arbitration is an attempt to show a consideration. But if in point of fact the United States had entered into the arbitration in consideration of such payment, the payment was to private claimants, and the arbitration was not a release of Reid's claim.

This effort to put this claim on the footing of the claims for French spoiliations is considered and answered by Mr. Benjamin, page 537, Congressional Globe, February, 1855; who shows also, conclusively, that if every allegation made in support of the claim was fully sustained, it is wholly untenable, and that the allowance of it will be followed by most mischievous consequences.

The act of 1834, donating \$10,000 to the captain and crew referred to by Mr. Fessenden and others, shows that Congress has already recognized their gallantry appropriately; and when it is recollected that the brig was fitted out to carry on privateering as a business speculation, I think that recognition sufficient.

But whether sufficient or not, is not here properly to be considered, as this claim ought to be decided on its legal merits, without regard to the gallantry displayed by the officers and crew of the "General Armstrong" at Fayal.

The heroic commander and his crew are justly entitled to the honor and gratitude of the country, all admit; but the recital of that honorable claim ought not to be mixed up with the argument on a claim for money dependent on legal considerations, and involving principles which ought to be decided without respect to persons.

M. BLAIR.

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#### OWNERS OF THE BRIG ARMSTRONG *vs.* THE UNITED STATES.

The opinion of the Court was delivered by Chief Justice GILCHRIST:

This case has been pending before the people and government of the United States, in various forms, for more than forty-one years. It has never, until recently, been in a situation to be thoroughly argued and investigated as a question of law and of fact; although, from the peculiar circumstances attending it, and from the discussions in Congress, it has commanded the attention and excited the interest of the public. We are now to consider it, however, in its relation to



individual rights and national liabilities, and in this point of view it requires a careful consideration.

The case is an interesting one in a national point of view, not only because it relates to the duties of neutral nations towards belligerents, but because it raises the question, how far a belligerent power is liable to its citizens for losses they have sustained through the neglect of their government to insist that the neutral nation shall perform its obligations? It is also interesting as a brilliant illustration of the gallantry and self-devotion of our countrymen.

The leading facts in the case have been notorious to the American people for more than forty years. On the twenty-sixth day of September, 1814, the American private armed brig General Armstrong cast anchor in the port of Fayal, a part of the dominions of the crown of Portugal, to get a supply of fresh water. In the afternoon the British brig *Carnation*, of 18 guns; the ship *Rota*, of 38 guns; and the 74-gun ship *Plantagenet*, came into the port, and anchored about 7 o'clock. In the evening four boats approached the General Armstrong. Captain Reid repeatedly hailed them, and warned them to keep off. They continued to approach, when he fired on them and killed and wounded several men. The boats returned the fire, and killed one man, and wounded the first lieutenant. The British then retreated, and about midnight renewed the attack with twelve boats and about four hundred men, which ended in their total defeat with great slaughter, and the partial destruction of their boats. The American brig carried seven guns, and her crew amounted to ninety men. She had two killed, and seven wounded, while the killed and wounded on the part of the British must have been nearly two hundred men. So great was the loss that the *Calypso* sloop-of-war, which arrived a few days after, was sent home with the wounded men. The British commander, Captain Lloyd, finding this mode of attack unavailing, with laudable discretion anchored the *Carnation* close in shore, and cannonaded the brig, when her gallant defenders, finding it useless to resist such an overwhelming force, abandoned the vessel, and she was then safely set on fire by the British.

The kingdom of Portugal was neutral, or professed to be so, in the war between the United States and Great Britain, and Fayal was a neutral port. Any violation of the neutrality of the port, by either of the belligerents, was a breach of the law of nations. The property of belligerents when within the neutral jurisdiction is inviolable. It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution.—(1 Kent. Com., 117; Vattel, B. 3, ch. 7, § 132.) In the case of the *Twice Gebroeders*, (3 Rob., 136.) Sir William Scott says that no use of a neutral territory for the purposes of war is to be permitted. "Such an act as this," he says, "that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted."

That there was a violation of the neutrality of the port of Fayal by the one party or the other is indisputable. If the party attacked merely exercised the right of self-defence, that cannot be a cause of complaint. It is a question of fact, to be determined upon an examination of the evidence, which party violated the rights of the neutral by attacking the other. Did the American brig, with her seven guns and ninety men, commit the folly of attacking the boats of the British squadron, reinforced as their crews might almost instantly have been by many hundreds of men, or did the British commander, seeing the brig lying, as he imagined, helpless within his grasp, determine to attack and carry her at all events; and did he pursue the course which any officer would have adopted if his object were to capture an enemy's vessel? This of itself would, according to Sir William Scott, have been a violation of neutrality, "Suppose," he says, "that even if a direct hostile use should be required to bring it within the prohibition of the law of nations, nobody will say that the very act of sending out boats to effect a capture is not in itself an act directly hostile." Chancellor Kent says: "No measure is to be taken that will lead to immediate violence."—(1 Kent Com., 118.) Upon this point the law is clear and indisputable.

The first question that presents itself is a question of fact, and that is, whether in this transaction the British or the Americans were the aggressors. More than forty-one years have elapsed since the affair happened. We are not, however, forced to depend upon the testimony of witnesses given for the first time after so long a period, and from the credit of which time and the failure of memory might properly require us to make some deduction. We have the statements of those who were actors in the transaction, made at the time of its occurrence, and with every opportunity of knowing the truth. It is agreed by the counsel on both sides that the facts and the law are now both before us, and the various questions in the case have been argued with a skill and ability that leave nothing to be desired. We shall endeavor to examine the evidence, irrespective of the consideration that the United States and Great Britain were then at war, and of any national feeling that might be excited by the sanguinary conflict that took place in the harbor of Fayal. We shall examine, in the first place, the testimony of the witnesses, both American and English, who were actors in the transaction.

On the 27th day of September, 1814, Samuel C. Reid, the captain of the *Armstrong*; Frederick A. Worth, the first lieutenant; Robert Johnson, third lieutenant; Benjamin Starks, sailing master; John Brosnahan, surgeon; Robert E. Allen, captain of marines; Thomas Parsons, James Davis, Eliphalet Sheffield, and Peter Tyson, prize masters of the brig, made oath before Mr. Dabney, the American consul for the Azores, to a declaration and protest, the material parts of which are as follows:

"That he (Reid) sailed in and with said brig from the port of New York on the ninth day of September last past, well found, staunch, and strong, and manned with ninety officers and men for a cruise; that

nothing material happened on the passage to this island until the 26th instant, when she cast anchor in this port, soon after 12 o'clock at noon, with a view to get a supply of fresh water; that during the said afternoon his crew were employed in taking on board water, when, about sunset of the same day, the British brig-of-war *Carnation*, Captain Bentham, appeared suddenly, doubling round the north-east point of this port; she was immediately followed by the British ship *Rota*, of thirty-eight guns, Captain P. Somerville; and the seventy-four gun ship *Plantagenet*, Captain Robert Lloyd, which latter, it is understood, commanded the squadron. They all anchored about 7 o'clock p. m., and soon after some suspicious movements on their part, indicating an intention to violate the neutrality of the port, induced Captain Reid to order his brig to be warped in shore, close under the guns of the castle; that in the act of doing so, four boats approached his vessel, filled with armed men. Captain Reid repeatedly hailed them and warned them to keep off, which they disregarding, he ordered his men to fire on them, which was done, and killed and wounded several men. The boats returned the fire, and killed one man and wounded the first lieutenant; they then fled to their ships, and prepared for a second and more formidable attack. The American brig, in the meantime, was placed within half cable's length of the shore, and within half pistol shot of the castle. Soon after midnight, twelve, or, as some state, fourteen boats, supposed to contain nearly four hundred men, with small cannon, swivels, blunderbusses, and other arms, made a violent attack on said brig, when a severe conflict ensued, which lasted near forty minutes, and terminated in the total defeat and partial destruction of the boats, with an immense slaughter on the part of the British. The loss of the Americans in the action was one lieutenant and one seaman killed, and two lieutenants and five seamen wounded. At daybreak the brig *Carnation* was brought close in, and began a heavy cannonade on the American brig, when Captain Reid, finding further resistance unavailing, abandoned the vessel, after partially destroying her, and soon after the British set her on fire. The said Captain Reid, therefore, desires me to take his protest, as he by these presents does most solemnly protest, against the said Lloyd, commander of the said squadron, and against the other commanders of the British ships engaged in this infamous attack on the said vessel when lying in a neutral, friendly port; and the said Captain Reid also protests against the government of Portugal for their inability to protect and defend the neutrality of this their port and harbor, as also against all and other state or states, person or persons, whom it now doth or may concern, for all losses, costs, and damages that have arisen or may arise to the owners, officers, and crew of the said brig General Armstrong, in consequence of her destruction and the defeat of her cruise, in the manner aforesaid."

It will be perceived that Captain Reid and his officers state that some suspicious movements, indicating an intention to violate the neutrality of the port, induced Captain Reid to order his brig to be warped in shore, close under the guns of the castle; "that in the act

of doing so, four boats approached his vessel, filled with armed men. Captain Reid repeatedly hailed them, and warned them to keep off, which they disregarding, he ordered his men to fire on them, which was done, and killed and wounded several men. The boats returned the fire, and killed one man and wounded the first lieutenant."

Here ten witnesses, upon whose veracity no imputation has been cast, and who had the means of observation, give an account of a transaction which happened under their own eyes, and in which they took a part.

On the other side is the deposition of Lieutenant Robert Fausset, sworn to on the 27th of September, 1814, before the British consul at Fayal, who states that, "On Monday the 26th instant, about eight o'clock in the evening, he was ordered to go in the pinnace or guard-boat, unarmed, on board his Majesty's brig *Carnation*, to know what armed vessel was at anchor in the bay; when Captain Bentham, of said brig, ordered him to inquire of said vessel; which, by information, was said to be a privateer. When said boat came near the privateer, 'they hailed to say the Americans,' [which probably should be, "the Americans hailed,"] and desired the English boat to keep off, or they would fire into her; upon which Mr. Fausset ordered his men to back astern, and with a boat-hook was in the act of so doing when the Americans, in the most wanton manner, fired into the said English boat, killed two and wounded seven, some of them mortally; and this, notwithstanding said Fausset frequently called out not to murder them, that they struck and called for quarters. Said Fausset solemnly declared that no resistance of any kind was made, nor could they do it, not having any arms, nor, of course, sent to attack said vessel. Also several Portuguese boats, at the time of said unprecedented attack, were going ashore, which, it seems, were said to be armed."

This deposition is said, in the letter of Count Tojal to Mr. Hopkins, of September 29, 1849, to be "confirmed under oath by the master and one seaman of that barge."

The contradictions are, that the protest says the boats were armed while Fausset says they were unarmed; the protest says the fire was returned, while Fausset says they made no resistance; the protest says four boats approached the brig, while Fausset says he approached with the pinnace only; the protest says that the boats disregarded the warning of Captain Reid to keep off, and that then he fired; Fausset says that upon being ordered to keep off he ordered his men to back astern, and was in the act of doing so when the Americans fired. Upon all these matters there is the testimony of ten witnesses from the brig against three from the boat; and, of course, the weight of evidence is decidedly in favor of the Americans, admitting all the witnesses to have been equally honest, and to have possessed equal opportunities for knowing the truth.

Now, upon this evidence, derived as it is from the actors in the transaction, who are the very best sources of information, no intelligent jury could doubt for a moment that the statements in the protest were proved. They would find the facts to be as we do, that four

armed boats approached the brig ; that they were hailed and ordered to keep off or they would be fired into ; that they disregarded the warning ; that the Americans then fired and killed some of their men : that they returned the fire, and killed one man and wounded the first lieutenant. These facts we find to be proved by the evidence.

But there are some statements in Fausset's deposition, which, to say the least, are singular, and which cast some doubt upon the entire correctness of his story. It appears from his deposition that the British knew that the brig was an "armed vessel," and "by information, was said to be a privateer." He says that "he was ordered to go in the pinnace or guard boat, *unarmed*," to the *Carnation*, to know what vessel it was ; and the captain ordered him to inquire of the brig. Now, it is singular, that in the evening, in a time of war, the commodore of a British squadron should be so particular as to order the boat to be *unarmed*, and still more singular that Captain Bentham should, at such a time, order an unarmed boat to approach a vessel which he knew to be armed, and supposed to be a privateer, and probably an American privateer. It was not by sending out unarmed boats, under such circumstances, that British naval officers attained for their country, and so long exercised, the sovereignty of the seas ; and the British officers of forty years ago were not trained in a school that would tolerate such negligence. It is singular, also, that Fausset, who was sent to inquire "what armed vessel was at anchor," did not hail the brig at all ; but, instead of laying off at a proper distance and hailing the brig, he was so near, when the Americans hailed *him*, that he says he backed his boat astern *with a boat-hook* ! If he went there in his unsuspecting simplicity merely to procure information, was it necessary for him, in that quiet bay, and that moonlight night, to run his boat directly against the vessel's side ? Could he not have laid off a hundred feet from the brig, *too far to board her*, but near enough to get an answer to his question ? His story is entirely inconsistent with the position that he desired only to know what vessel she was, and strongly confirms the assertion in the protest, both that Captain Reid's warning was disregarded and that the boat returned the fire. It is difficult to understand the purpose of Fausset's allusion to the Portuguese boats, which, "at the time of the attack, were going ashore, which, it seems, were said to be armed," unless it be to intimate that Captain Reid mistook Portuguese armed boats going ashore for English armed boats about to attack his vessel. The Portuguese boats had nothing to do with the affair ; this is the only allusion to them, and the fact of their presence in the bay is wholly immaterial. It may be added that Fausset says more than that the boat was *unarmed*, from which it might be inferred that it was unarmed for an assault merely ; for he says that "no resistance of any kind was made, nor could they do it, not having *any* arms." He thus makes the condition of his boat so extremely defenceless that his story fails to carry conviction with it.

But it is said the Americans fired the first shot, and were consequently the aggressors. That they fired the first shot is clear, but the consequence does not follow that by so doing they were the

aggressors. Sir William Scott says, 3 Rob., 136, "that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted." That the British did send out their boats on a hostile enterprise, is, we think, too clear to admit of a doubt. What, then, was Captain Reid to do in the face of the moral certainty that the British were determined to capture his vessel? Was he to permit them to come on board; to surrender the brave men who looked to him for an example, to be carried to the prison at Dartmore, or to be compelled to serve against their countrymen in an English frigate? Was he not rather to obey the dictate alike of common sense and military honor, that in doubtful emergencies it is safer and nobler to fight than to retreat; and beyond all this, had he not a *right*, upon every principle that should animate a commander, having done all that prudence and discretion could ask for, to strike one blow in defence of his ship? We have entirely mistaken the extent of the right of self-defence, if both law and reason did not justify him in firing upon the English boats.

But even in the absence of direct evidence, the presumption that the boats were armed, and that the intention was hostile, is extremely strong. We were at war with England. When the British squadron came into the port and discovered the American brig, it was well understood that all the vessels present were ships-of-war. It is absurd to say that these four boats were sent merely to reconnoitre the brig. Such a force was entirely unnecessary for that purpose. Such a thing was never heard of as that in the evening, in time of war, a naval commander would approach a vessel which he did not know to be friendly, with four boats filled with unarmed men. And even if Fausset's statement be assumed to be correct, and one boat only approached the brig, it is extremely improbable that if his boat were unarmed, and his intentions were friendly, he would without hailing the brig, have come sufficiently near to her to reach her with a boat-hook, when it was just as easy to ascertain what vessel she was without coming so near as to excite suspicion. Especially would he have been cautious not to come too near, when, as the protest states, "Captain Reid repeatedly hailed them and warned them to keep off." It is also worthy of remark that Fausset's deposition, made on the 27th of September, 1814, was not produced until thirty-five years afterwards, when it first made its appearance on the 29th of September, 1849, in the letter of Count Tojal to Mr. Hopkins. It is singular, too, that a new and entirely different version of the transaction is given in the letter of Señor De Castro to Mr. Barrow of the 3d of August, 1843, in which he says, "It is affirmed on the part of Great Britain that they (the boats) only carried inoffensive men, who were going ashore from their ships on duty, and that they casually met the American brig when she was preparing to leave the port of Fayal." It is enough to say of this statement that it directly contradicts Fausset's deposition, and that both cannot be true.

In addition to the positive evidence and the presumptions, there

are also the contemporary declarations of the official persons at the island.

Mr. Dabney, the American consul at Fayal, in his official note to the governor of the Azores, dated at nine o'clock in the evening of the 26th of September, 1814, says: "In violation of the neutrality, &c., the ships-of-war of his Britannic Majesty now lying in this port, lately ordered four or five armed boats to surprise and carry off the American armed schooner General Armstrong. \* \* \* The boats were repulsed, but a new and more formidable attack is now feared," &c. On the 28th of September, 1814, the governor of the Azores, Elias Jose Ribeiro, states in his despatch to his government as follows: "We are now, for the first time, made witnesses to a horrible and bloody combat occasioned by the madness, pride, and arrogance of an insolent British officer, who would not respect the neutrality maintained by Portugal in the existing contest between his Britannic Majesty and the United States of America."

He also says: "I learned that a boat had been sent from the British ships-of-war to examine the privateer, and on its return three others had been sent armed, and that the captain of the privateer not wishing to allow them to come on board of his vessel, a fire was begun on both sides."

The governor then states that he desired a conference with the British commander, that he "might dissuade him, if he were a reasonable man, from continuing the hostilities begun so insolently, and repeated, to the scandalous contempt of the law of nations."

He further says, that he conceives the British commander "was aware of the great evil done by his hostile expeditions in a port not only neutral, but, moreover, belonging to an old friend and ally of his nation;" and that he wishes to show him his "resentment on account of the insults committed by him;" nor did he consider his invitation to visit his ship "either proper or decorous."

The British commander, in answer to a request by the governor that he would respect the neutrality of the port, states, on the 26th of September, "that one of the boats of his Britannic Majesty's ship under my command was, without the slightest provocation, fired on by the American schooner General Armstrong, in consequence of which two men were killed and seven were wounded; and that the neutrality of the port, which I had determined to respect, has been thereby violated. In consequence of this outrage I am determined to take possession of that vessel." To this the governor replied: "I must however assure you, sir, that from the accounts which I have received, it is certain that the British boats were the first to attack the American schooner."

It appears, also, from the diplomatic correspondence, that the United States always asserted, and that Portugal for a long time admitted, that the British were the aggressors, and that there was a just claim against Portugal.

In the letter of the Marquis d'Aguiar, the minister of foreign affairs, to Lord Strangford, the British minister, of December 22, 1814, he speaks of "the outrageous manner in which that commander vio-

lated the neutrality \* \* by audaciously attacking the American privateer," and of "the base attempt of the British commander, at the time he commenced the unprovoked attack on the American privateer, to attribute those violent measures to the breaking the neutrality on the part of the Americans in the first instance."

He states, also, that the Prince Regent had "directed the minister at London \* \* to require satisfaction and indemnification not only for his subjects, but for the American privateer, whose security was guarantied by the safeguard of a neutral port."

Mr. Sumter, the American minister at Rio, in his letter of January 1, 1815, to the Marquis d'Aguiar, speaks of reparation to the Prince Regent of Portugal, for so "rude and degrading an attack upon his sovereign authority."

In his letter to Mr. Sumter the marquis speaks of "the manifest violation of his territory (by the British) in the infringement of its neutrality."

In Mr. Monroe's letter of the 3d of January, 1815, to Mr. Sumter, he says: "The growing frequency of similar outrages on the part of Great Britain renders it more than ever necessary for the government of the United States to exact from nations in amity with them a rigid fulfilment of all the obligations which a neutral character imposes."

On the 14th of March, 1818, Mr. Adams, in a letter to the Portuguese minister at Washington, said: "It is hoped your government will, without further delay, grant to the sufferers by that transaction the full indemnity to which they are, by the law of nations, entitled."

In the letter of Mr. Dickins, the acting Secretary of State, of the 20th of May, 1835, to Mr. Kavanagh, the American chargé at Lisbon, he says: "The Portuguese authorities at that place having failed to afford to this vessel the protection to which she was entitled in a friendly port, which she had entered as an asylum, the government is unquestionably bound by the law of nations to make good to the sufferers all the damages sustained in consequence of the neglect of so obvious and acknowledged a duty."

Mr. Kavanagh states to Mr. Forsyth, from Lisbon, on the 30th of January, 1836: "It appears that the British commander alleged at the time that the crew of the General Armstrong had provoked the first attack by firing into his boats; but the protest made and signed on the 27th of September, 1814, by Captain Reid and all his officers, and corroborating circumstances, disprove this allegation." He repeats his demand for indemnity in his letter of the 17th of February, 1837, to the Portuguese minister of foreign affairs.

In his despatch to Mr. Forsyth, of the 18th of March, 1837, he states that he had had an interview with the minister, who "spoke of the claim as one which at present could not be considered admissible;" and who said that "the Portuguese force at Fayal was altogether incompetent to protect the privateer against the assailants."

On the 15th of January, 1842, Mr. Webster wrote to Mr. Barrow concerning the claim: "Its justness, I believe, has never been denied." And Mr. Barrow makes the same statement in his letter of May 25, 1842, to the Portuguese minister of foreign affairs. Mr. Webster, in



his letter to Mr. Barrow, of the 18th of August, 1842, speaking of this claim and of that of James Hall, says: "Both these claims are regarded as just by this government, and will not be relinquished under the objections heretofore made to them by the Portuguese government, which are entirely unsatisfactory."

Mr. Barrow, in his letter of February 20, 1843, to Mr. Webster, says: "The pretexts for delay in the two former cases, (the General Armstrong and James Hall,) are of a very frivolous character, and such will continue to be given, I am convinced, until a very decided tone is assumed by our government." On the 20th of March, 1843, he writes: "There has been from the first a manifest disposition, I might say determination, on the part of the Portuguese government \* \* \* to avoid the liability to which they are subject by the law of nations in the case of the General Armstrong."

Such are the contemporary declarations of witnesses who saw the transaction; the indignant remonstrance of the governor of the Azores; the admissions of the Portuguese government of the existence of a claim on our part, contained in their demand for an indemnity from England on account of the loss of the brig, and the repeated assertions of our government of a violation of the neutrality by the British. Until the 4th of August, 1843, there had been no denial, but an admission of the justice of this claim upon them. But on that day the Portuguese minister, in a letter to Mr. Barrow, says: "The accounts all agree that the American brig, under the pretext that four boats from the said British vessels were approaching her, fired upon them, killing some of the men and wounding others. \* \* It is, however, an undeniable fact that the first shot came from the American brig, *thus evidently constituting her the aggressor*, and a violator of the neutrality of the port of a friendly nation."

Now the Portuguese minister must be presumed to have read the evidence on the subject concerning which he thought fit to write a letter, and his most extraordinary declaration that all the accounts agreed that the American brig was the aggressor, must have been made in the face of the letter of the governor of the Azores, of the 27th of September, 1814, that it was "certain that the British boats were the first to attack the American schooner;" and of his other expressions of indignation at the conduct of the British. Whatever it arose from, whether from an inability to appreciate the evidence, a disposition to procrastinate, or an unwillingness to offend the British government, its incorrectness is manifest. It may be remarked, that among the public documents are to be found allusions to the influence of the British minister in hindering the payment of this claim by Portugal. It is singular, indeed, that the Portuguese government should not have discovered that the evidence proved the Americans to have been the aggressors until twenty-nine years had elapsed since the affair, and until the production of Fausset's deposition, which had slumbered in obscurity during that period. That the British government felt an interest in the matter, appears from Mr. Clayton's speech in the Senate on the 26th of January, 1855. He says that the British minister "desired to confer with me, on one occasion, in regard to

the matter, but I declined any conference with him on the subject. I thought the British government had no right to interfere."

The governor of Fayal made no complaint that the Americans had violated the neutrality of the port. That discovery, as has been stated, remained to be made by the Portuguese minister in 1843. The governor did, however, complain of Captain Lloyd, and remonstrated against his proceedings; and even the minister, in his letter of August 3, 1843, says that "the government of his Britannic Majesty, appreciating the rashness with which his officers acted in a neutral port against said brig, had no hesitation in apologizing to the Portuguese government." This statement, however, was denied by the British government, as appears from the letter of Count Tojal to Mr. Clay, of the 15th of May, 1850. It does not appear to be necessary to settle the question of veracity between them.

Considering it then, as proved, that the British were the aggressors, the question arises, whether it was the duty of Portugal, according to the law of nations, to make pecuniary compensation for the damages sustained by the injured party.

Upon this point the opinion of the government of the United States, as expressed through the various Secretaries of State, is entitled to much weight. That Portugal was bound to pay the damages sustained, is asserted by Mr. Monroe, Mr. Adams, Mr. Forsyth, Mr. Upshur, Mr. Webster, and Mr. Clayton. Mr. Forsyth, in his letter of September 21, 1836, instructs Mr. Kavanagh to "demand from the Portuguese authorities the highest amount of damages which, in your judgment, a prudent and conscientious man would feel himself justified in asking were he prosecuting his own claim." The same instructions are given to Mr. Clay in Mr. Clayton's letter of March 8, 1850.

It is doing the eminent men who occupied the responsible position of Secretary of State great injustice to assert that when they alleged that Portugal was liable in damages, they did not express their honest convictions, but condescended to the position of an advocate. They had no temptation to say what they did not believe. The claim was not made a party question, nor did it have any connexion with party politics. There was no call upon them to hazard their reputation as statesmen and jurists upon a position which they did not believe to be tenable.

But the case of Portugal is attempted to be put on the ground that she was unable to protect her neutrality.

To this position there are two answers. In Count Tojal's letter of March 9, 1850, to Mr. Clay, he says that, "no neutral is obliged to give pecuniary indemnification for damages and material losses that may have been caused in its ports by one belligerent to another, once it can be shone that it has used all the means at its disposal to give protection."

The answer to this is thus strongly put by Mr. Clay, in his letter to Count Tojal, of March 15, 1850. He says: "What were the means in her power? She had the physical power of more than 100 regular soldiers, some artillery, a fort, the power of the population of Fayal, about thirty American seamen, who requested to be allowed to defend

their brethren, great advantage of position, and the immense moral power of right against wrong; these were the means she had. Did she use all or any of them to protect and defend the privateer? Confessedly she did not; she even went beyond mere failure to defend or protect when she prevented the American seamen from rendering whatever assistance was in their power. And if she did not use *all these means*, is it not clear, from his excellency's own argument, that she is bound to indemnify?"

The whole tenor of the despatch to the governor of the Azores, of the 28th of September, 1814, shows that he used no means whatever with the British commander but expostulation. Although indignant at the outrage upon the sovereignty of Portugal, the despatch needs only a careful perusal to make it apparent that the governor was paralyzed by the position in which he stood, and that he had no firmness. He seems to take credit to himself for refusing to consent that the American seamen might aid in defending the brig, for taking away from the Americans, as they came ashore, their swords and pistols, and for the energetic feat of ordering the standard not to be hoisted over the castle the next morning to show his resentment at the conduct of the British. He mentions, also, his decided act in seizing two American seamen who, during a funeral, "gave shouts of joy on account of the fight and retreat in which these officers lost their lives." All these might have been very bold and gallant acts, but, unfortunately for him, his government did not approve of his conduct. The Marquis d'Aguiar, the Portuguese minister of foreign affairs, in his letter to Lord Strangford, of the 22d of December, 1814, says, that if it were not for the idea that he desired to protect the inhabitants from the ravages which the British commander would not have failed to inflict, "the censurable moderation of the governor during these outrages would have induced his royal highness to have immediately caused a process to have been instituted for the punishment of that officer." The question is not whether Portugal was a stronger or a weaker nation than Great Britain. It is simply whether at Fayal, and under the existing circumstances, the governor did what his duty required of him as an officer of a neutral nation; and his government answered that question by saying that he *did not* do his duty. With these facts and admissions it is almost idle to say that Portugal was not bound to make indemnity because she was weak. Bynkershoeck says: "If it be the duty of the sovereign to use his utmost endeavors to effect that purpose, it follows that he must do it at his own expense. Nay, by going to war, if other means are not sufficient. Such is the law which is observed among all nations."—(Bynkershoeck's Law of War, by Duponceau, p. 60.)

But admitting, for the sake of argument, that the governor of the Azores used all the means in his power, and was unable to resist the British force, the other answer to the position is, that the law of nations did not relieve her from the obligation to make pecuniary compensation.

Now, if Portugal was unable to protect her neutrality, that was her

misfortune. Chancellor Kent says: "If the enemy be attacked or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution."—(1 Kent, 122.) That is, if the enemy be attacked the neutral is bound to redress the injury; if a capture be made, the neutral is bound to effect restitution. The question here does not relate to the restitution of property captured, but to the redress of an injury from a hostile attack. How is an injury, sustained by reason of an attack upon the property of an enemy's citizen, to be redressed but by paying for the injury done? The position is stated absolutely and without any provisos or limitations. Can it be that a neutral is bound to restore a ship captured in its waters, but if the ship be captured and then sunk by the enemy, no duty whatever rests upon the neutral? The same reason which requires a neutral to restore a captured vessel, calls on it also to make compensation where a vessel is destroyed. The same principle lies at the foundation of either duty. The position that a neutral is bound to make restitution, but not compensation, may thus be stated: If the neutral sees a ship captured in its waters and is able to effect restitution, it is bound to do so. But if restitution cannot be made from whatever cause, then the neutral is to remonstrate to the belligerent who has done the wrong, and who knows that the neutral has done all it could; and if the belligerent refuses to do anything in the matter, still the law of nations is satisfied and the affair is settled. Such was the course adopted in the present case. The vessel was destroyed by the British, and the neutral remonstrated, consequently, the neutral was absolved from all obligations to make compensation. This distinction between restitution and reparation, although inappreciable by the unassisted reason, may exist in virtue of some mysterious *afflatus* which is supposed to inspire the councils of diplomatists. It is enough to say that it deprives the law of nations on this point of all vitality, and reduces it to a solemn absurdity. When a ship is destroyed this distinction releases the neutral from the obligation to do what is physically impossible, but it absolves the neutral from the duty of doing the only thing in its power, that is, to effect restitution.

It is unnecessary to take the position that a neutral is bound always to have in all its ports a force sufficient to resist any attack that might be made. This would be unreasonable, for even England, with her powerful navy, could not accomplish it. But it is equally unreasonable to say that because a neutral did not happen to have at any given place a sufficient force to protect its neutrality, therefore it is absolved from all duty, happen what may. That Portugal, relatively to England, was a weak nation, may be admitted. But she assumed to be neutral in the war between England and America. As she claimed the rights, so she was subject to the obligations of neutrality. If she was not strong enough to cause herself to be respected as a neutral, she should not have placed herself in that position. She chose her part in the great republic of the world, and stood in relation to other nations upon a common ground with them. It is said by Vattel, (Prel. ch. § 18,) "since men are naturally equal, and a perfect equality prevails

in their rights and obligations, as equally proceeding from nature, nations composed of men and considered as so many free persons, living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom." This is a clear and precise statement by an eminent writer of the reciprocal rights and obligations of nations, whatever may be their relative power. As weakness does not deprive a nation of its rights, it does not release her from the obligations which she owes to other nations. A nation may be weak as regards armies and fleets, but she may be wealthy. It may be a part of her policy to avoid the expenditure of her resources in military and naval preparations. She may choose to lavish her revenue upon the empty forms and pageantry of government, disregarding and careless of the advance and happiness of her people. But it would be strange indeed if the course she might see fit to adopt of her own free will should be received as an excuse for her non-performance of the duties which she would exact towards herself from nations whose government might be better administered, and whose revenues might be more carefully expended.

In Molloy's *Treatise De Jure Maritimo*, b. 1, ch. 1, sec. 16, a case is stated which affords an exact precedent for the one before us. After mentioning several cases where hostile encounters were forbidden in neutral ports, he says: "But they of Hamburg were not so kind to the English when the Dutch fleet fell into their road, where rid at the same time some English merchantmen, whom they assaulted, took, burnt, and spoiled; for which action, and not preserving the peace of their port, they were, by the *law of nations*, adjudged to answer the damage, and I think have paid most or all of it since."

It is not to be expected that many precedents are to be found exactly resembling the present case, which was so peculiar in its circumstances. During her long war with France, England, by her powerful navy, was enabled to set at defiance the law of nations in respect to neutrals with impunity; but the case cited from Molloy shows that the English claimed from Hamburg, in 1665, the same compensation in damages which the present claimants demanded from Portugal. It is unnecessary for us to pursue the investigation of the question as to the liability of Portugal any further. We have the opinion of the most eminent jurists and diplomatists of the United States, the authority of Molloy, and, as we think we have shown, the intrinsic propriety and reasonableness of the position. We have found nothing in the books which deserves to be weighed against these views. Even Flanders, in his treatise on Maritime Law, (p. 45,) although he states as his individual opinion that the reasoning which maintains the obligation of the neutral to answer in damages, seems to him to be inconclusive, admits that it is held by writers on the law of nations that the neutral is bound to redress the loss himself. But he cites no authority to the contrary, and he can find no stronger ground on which to found his opinion, than that the neutral is a host

extending his hospitality to a belligerent who comes into his port. But, with submission, we conceive that such is not the relation in which the parties stand to each other. A nation which assumes to be neutral has certain duties which she is compelled, by the law of nations, to perform. It is said by Vattel, book 3, chap. 7, § 118: "A neutral nation preserves towards both the belligerent powers the several relations which nature has instituted between nations. She ought to show herself ready to render them every office of humanity reciprocally due from one nation to another. She ought, in everything not directly relating to war, to give them all the assistance in her power, and of which they may stand in need." It thus appears that the neutral is not a host extending hospitality *ex mera gratia*, but is part of the great republic of nations, bound to render offices of humanity. The parallel of this writer, therefore, fails, and his opinion must fall with the inaccurate figure which he uses to illustrate his views.

Our opinion is, that Portugal was bound, by the law of nations, to make to the claimants pecuniary compensation.

The proposition to refer this case to an arbitrator came from the Portuguese government. The course of the United States had been consistent throughout. We had always maintained that we had a valid claim upon Portugal; that the facts showed that the British were the aggressors, and that, by the law of nations, Portugal was bound to redress the injury sustained by our citizens. The first remark on the subject of an arbitration we have found is in Mr. Clayton's letter of the 8th of March, 1850, when he wrote to Mr. Clay, American chargé d'affaires at Lisbon: "In regard to a reference of our claims to an arbitrator, which has been indicated, the President has directed me to say that no such course will, under the circumstances, receive his sanction; and this for reasons too obvious to need enumeration." On the 30th of April he wrote to the Portuguese minister at Washington, that the matter would be referred to Congress "should the Portuguese government persevere in the refusal to adjust and settle what are believed to be the incontrovertible claims of American citizens upon that government," and he rejected the proposition of the minister to submit this claim to arbitration.

The treaty between the United States and Portugal was concluded on the 26th of February, 1851. The first article provides that Portugal shall pay to the United States a sum equivalent to the indemnities claimed for several American citizens. By the second article it is agreed that the parties, "not being able to come to an agreement upon the question of public law involved in the case of the American privateer brig General Armstrong, that the claim presented by the American government, in behalf of the captain, officers, and crew of the said privateer, should be submitted to the arbitrament of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties."

In relation to the arbitration we may remark, that in whatever we may say upon the subject, we do not mean to be understood as denying the right of the government of the United States, acting for the

whole people, to submit to arbitration any controversy with a foreign government in which public interests are alone involved. Nor is it necessary to deny the power of the United States to submit to arbitration the claim of one of its own citizens upon a foreign government which it has been prosecuting, in such a way as to preclude itself from again pressing that claim upon such foreign government, or insisting upon it in any way as a cause of war, or a matter of national concern. There is a broad distinction between the submission of a case involving national interests exclusively, and the submission of a case relating to private rights alone, where the only matter of public concern is the general duty of a government to protect its citizens. Where a case of the latter description is submitted, it must be done with a due regard to the rights of the citizen. If his rights be disregarded and sacrificed, it is the dictate alike of law, common sense, and justice that the government by which his rights have been sacrificed should make him restitution. We think it cannot be denied, that to relieve a government from liability to a citizen on this account, it should appear that the case was one proper to be submitted; that he had an opportunity of being heard before the arbitrator by argument and proofs; that the award was certain, definite, and within the submission; and that the arbitrator did not exceed his powers.

In the first place, we are unable to perceive what good and sufficient reasons there were that required the United States to submit the claims of their citizens upon a foreign government to arbitration. We find no reasons alleged in the correspondence that led to the submission. A citizen of this republic is entitled to ask his government, respectfully, why a given course was pursued in relation to his private rights. The government holds its public powers by no higher tenure than the citizen possesses his private rights. Public powers are delegated, and private rights are possessed by the will and assent of the people. The day is gone by, at least on this side the Atlantic, when the rights and interests of millions can be settled definitely by diplomatists in secret session, and when no other answer to a complaint is condescended than that such matters are mysteries of State, into which even the party aggrieved has no right to inquire. We entrust our public interests to our public officers, in the confidence that they will discharge their duty. If those duties are neglected or mismanaged, we find a remedy in the ballot-box. But when a citizen has a claim upon a foreign government, which from the nature of the case, as he is powerless against the foreign government, can only be redressed through the agency of his own government, and that claim is sacrificed by his government, he has no remedy unless his government will indemnify him. He may, surely, with propriety, ask the question why his claim was submitted? In the present case that the British were the aggressors was a fact patent, known at the time to hundreds of persons, which we had always asserted to be true, and which the evidence proves to be true. No impartial man can investigate the evidence and reach any other conclusion. Not only is the evidence on the point overwhelming, but such has always been the

position taken by the United States from 1814 to 1841, by every administration, every Secretary of State, every American minister, and until the year 1843, admitted to be true by the Portuguese government itself. If, as Mr. Webster wrote to Mr. Barrow on the 13th of January, 1842, the justice of this claim had never been denied, why did that eminent man consent to submit it to arbitration? What call was there upon him to put it out of the power of the United States to perform that first and most sacred of duties, protection of the rights of the humblest citizen? A party who has a claim, of which no one denies the justice, is a most unfit manager of his business when he submits it to arbitration, and thereby gives the arbitrator a discretionary authority to allow or reject it at his pleasure. We had always asserted that Portugal was bound by the law of nations to redress this injury; and there is nothing in any part of the diplomatic correspondence on our part that tends to show that we ever intended to recede from this position. We had positively asserted that both the law and the facts were with us. We had expressed our views in every form. We had presented a firm, but temperate statement. We had resorted to argument. We had finally asserted our fixed determination that the injuries of our citizens *must* be redressed. Such being our position, the inquiry may properly be made why the various questions in this case, involving the private rights of American citizens, should be exposed to the hazard of being loosely and partially considered by an European sovereign, who, to say the least, would be as likely to be influenced by considerations of state policy as by a regard to individual rights. If the government did not see fit to have recourse to arms to enforce the claim, they might at least have abstained from compromising the rights of the claimants. But when the government were convinced that the facts were as the claimants alleged, the conclusion of law followed of course. The claimants alleged that the British were the aggressors. The government believed that such was the case, and that Portugal was bound to pay the claim. These positions, then, being distinctly taken, it may safely be said that if this was a proper case for a submission, no case ever existed that would justify a resort to hostilities so long as an arbitrator could be procured to determine the controversy.

But whether this case was in itself, under the circumstances, proper to be submitted to arbitration, there is a further view to be taken of the submission.

On the 13th day of April, 1850, (Doc. 53, page 56,) Count Tojal wrote to Mr. Clay that the Portuguese government "will now propose to refer this affair to the decision of a third power." In his letter of July 6, 1850, (Doc. 53, page 73,) Count Tojal refers to several claims of American citizens upon Portugal. A list of them is given, with the amount claimed in each. They were ten in number, and the aggregate amount was \$233,327. The amount claimed in the case of the General Armstrong was \$131,600. The others amounted to \$91,727. Count Tojal then says: "The government of her Majesty, animated with the same desire, &c., yields to the force of circumstances, and



without again reverting to the justice or injustice of the claims presented by the government of the United States, and only *pro bono pacis*, offers to pay the said mentioned claims, amounting to \$91,727, according to Mr. Clay's account, with the only exception of that relating to the privateer General Armstrong. In respect to this claim the undersigned cannot deviate from the proposal heretofore made to Mr. Clay, that of so important a claim being submitted to the decision of a third power."

It is to be noticed that the justice and legality of the claims which Count Tojal thus offered to pay, had been denied as strenuously as the claim relating to the General Armstrong. Why the Portuguese government were unwilling to pay this claim, is indicated by the following extract from the same letter of Count Tojal: "Her Majesty's government, besides the arguments contained in the notes formerly addressed to the government of the United States, finds its judgment and the manner of weighing the question of the privateer General Armstrong, strengthened with the opinion of her Britannic Majesty's government, which has always deemed this claim of the government of the United States unjust." Why, again, it was necessary for Portugal to ask the opinion of England, is shown by another extract from Count Tojal's letter, in which he says: "The subsisting relations between her most faithful Majesty's government and that of her Britannic Majesty, *oblige* the undersigned to communicate to the British government all that has taken place."

But whatever influences operated upon the Portuguese government, and it is not difficult to appreciate them, the proposition made by Count Tojal was not divisible. It was complete in itself. It was not an absolute proposal to pay the other claims, but to pay them and to submit this to arbitration. As Portugal had, up to the time of the proposition, invariably denied the justice of the other claims, and as she said she offered to pay them and submit this, only *pro bono pacis*, we could not have called on her to pay the other claims, unless we agreed to submit this to arbitration. It would have been unreasonable in the extreme if our government had called upon Portugal to pay the other claims without agreeing to submit this. But that the proposal was one and indivisible is, we think, too clear to admit of question, or to need argument in its support. When, therefore, our government decided to accept the proposal, as it did, by Mr. Webster's letter of the 23d of August, 1850, it assumed the right, which, in the present case, we are not disposed to deny or inquire into, of exposing the claim of the owners of the General Armstrong to the chances of an arbitration for the purpose of procuring thereby the settlement of the remaining claims upon Portugal, and of putting an end to all embarrassing negotiations with that power.

The case does not call upon us to deny the right of the United States to submit to arbitration the claim of a citizen upon a foreign government without his assent, or even against his protest, and the question need not be investigated. Of course his assent would stop him afterwards from objecting that a submission was entered into. As there is evidence upon this point, we have examined it for the pur-

pose of showing the relative positions of the claimants and the United States.

On the 5th of September, 1850, Mr. Reid, the agent for the claimants, wrote to Mr. Webster: "I perceive it is proposed to refer the claim of the owners of the brig General Armstrong to the King of Sweden for arbitration. I hope the Department of State will make no final arrangements in this case under the present circumstances, and I desire that it may be left open until I can have a conference with you on the subject. \* \* \* I hope no steps will be taken which will compromise the rights of the claimants until I can have the pleasure of seeing you." To this letter Mr. Webster answered, on the 13th of September, that the proposition of Count Tojal to pay the several claims preferred by the American government against that of Portugal, with the exception alone of that of the General Armstrong, which was to be referred to the King of Sweden, &c., had already been accepted by the government.

We look in vain here for any evidence of assent to the submission. When Mr. Reid hears that it is proposed to submit the claim, he hopes that the matter will be left open until he can have a conference with Mr. Webster, and that no steps will be taken that will compromise the rights of the claimants until he can see him. Do these words mean the very reverse of what they express? Does Mr. Reid mean, when he uses this language, to say that he assents to the submission? If so, language was given us to disguise our thoughts, and not to express them. But not only does he not assent to the submission, but it was agreed to without any opportunity for him to assent or dissent, and without his knowing anything about it; for Mr. Webster informs him that the proposal of Count Tojal had already been accepted. If there ever were a plain case of dissent, it is furnished by Mr. Reid's letter. There is no evidence of his acquiescence in the submission, for all he did was to request that he might be heard before the arbitrator, after he was informed that the treaty had been concluded.

It may be proper to notice in this connexion a position taken by the solicitor, that a claimant, in a case like this, is conclusively bound by the action of his government. In the instructions to Mr. Kavanagh, of the 21st of September, 1836, Mr. Forsyth says: "It is well understood that after asking the interference of their government to procure redress for the injuries they suppose themselves to have sustained, the parties must abide by such settlement as that government may make." This proposition cannot be correct in the broad language used. No individual can urge his claims upon a foreign government with any hope of success excepting that derived from their sense of justice. A private person, armed with no power of enforcing his rights and unassisted by his own government, cannot speak in sufficiently impressive tones to insure his being heard by a foreign nation. His own government, in the discharge of that duty of protection which it owes to its citizens, must speak for him. "If any complaint is to be made on the part of the captured, it must be by his government to the neutral government for a fraudulent or unworthy or unnecessary submission to a violation of its territory.—(1 *Kent's Com.*, 121.) If Mr. Forsyth's statement be

correct, the government would be justified in making use of and surrendering the claim of one of its citizens for the purpose of procuring the payment of the claim of the another. If by saying that "the parties must abide by such settlement as the government may make," it be meant only that the party, after such settlement has been made, cannot enforce his claim against the foreign state, the position is correct. But if it be meant that whatever settlement the government of the claimant may make, it incurs no responsibility for the claim to its own citizens, the doctrine cannot be admitted. In the case of the *Baron De Bode vs. Regina*, 17 Eng. L. & Eq. Rep., 14, *Lord St. Leonards*, the Lord Chancellor, said: "It is admitted law that if the subject of a country be spoliated by a foreign government he is entitled to obtain redress from the foreign government through the means of his own government. But if from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country. Here is a compromise of the two governments; the question is, how far his claim is affected by it." It cannot be supposed, however, that Mr. Forsyth intended to convey the idea that whatever course the government might pursue in no event would it be liable to the claimant. Such a proposition would be, in substance, that the government is not responsible for wrong; a ground which, we presume, no one would seriously attempt to maintain.

Before examining the objections that have been made to the award, it is proper to consider the position taken by the claimants, that they were not permitted to be heard before the arbitrator.

The treaty having been ratified by the Senate on the 7th of March, 1851, on the 19th of March Mr. Webster wrote his letter of instructions to Mr. Hadduck, who had succeeded Mr. Clay as our chargé at Portugal. The material part of this letter refers to the third article of the treaty, which is as follows:

"So soon as the consent of the sovereign, potentate, or chief of some friendly nation who shall be chosen by the two high contracting parties, shall have been obtained to act as arbiter in the aforesaid case of the privateer brig 'General Armstrong,' copies of all correspondence which has passed in reference to said claim between the two governments shall be laid before the arbiter, to whose decision the two high contracting parties hereby bind themselves to submit."

Mr. Webster directs Mr. Hadduck "to compare and authenticate, jointly with the Portuguese government, the copies therein specified. You will understand, of course, that these copies are limited to such communications as have passed between the American legation and the Portuguese government at Lisbon, and between this department and the Portuguese legation in Washington." On the 12th of July, 1851, Mr. Webster wrote to Mr. Hadduck, and after stating the instructions contained in his previous letter, says: "To provide, however, against an omission of any important part of the earlier portion of the correspondence—I mean that which passed in 1814 and 1815, in Rio Janeiro, where the court of Portugal at that time resided, and which it could not have been intended to exclude—I transmit to you

herewith a printed copy of the correspondence as communicated to Congress on the 15th December, 1845." This letter, however, reached Mr. Haddock too late, as the treaty had been signed on the 23d of June previous. The papers omitted were the whole of Document 14 of the Senate, 1st session 29th Congress, covering fifty-eight pages. It is said that the whole of this document is contained, in substance, in the subsequent correspondence. One letter, however, was omitted, upon which much stress was laid in the argument on the question of fact, as to the party who made the first aggression. This was the letter from Mr. Greaves, the British consul, dated on the 27th of September, 1814, to the governor of the Azores, informing him that if the governor should permit the masts to be taken from the schooner, the commander of the squadron would regard the island as an enemy of his Britannic Majesty, and would treat the town and castle accordingly. This was relied upon as tending to prove that Captain Lloyd desired to capture the brig, and use her in his operations against this country.

But not only was no provision made for laying before the arbitrator all the correspondence which might throw light upon the case, but the claimants were refused the privilege of being heard before the authority which was to decide upon their rights. Upon the 7th of July, 1851, the agent of the claimants filed at the Department of State a written argument and statement of facts, which he requested might be sent to our minister, that he might submit it to the arbitrator, which was verbally refused on the ground that the terms of the treaty precluded it. To two notes to the Secretary of State to the same effect he received no answer. He then requested the President that he might be sent to France with the papers and documents that he might present his case through Mr. Rives ; but this was also refused.

It may well be asked here, why was the case so submitted that the party interested could not be heard? If the United States, in the plenitude of their power, see fit to submit the claim of a citizen to arbitration without his assent, ought they not to make the most careful and ample provision that he shall be fully and fairly heard, and that he shall have all reasonable opportunity to lay before the arbitrator the evidence on which he relies? An award made without the party having had an opportunity to be heard, rests neither upon law nor justice. If the case was sufficiently national in its bearings to be submitted to the arbitration of an European prince, it was surely important enough to deserve a careful investigation into the facts ; and the parties whose pecuniary interests were involved, were the very persons, of all others, to whom to entrust such an investigation.

The position that every party should have an opportunity to be heard before the tribunal that is to pass judgment on his rights needs no labored argument to support it. It has been repeatedly asserted by the most eminent jurists. In *Rigden vs. Martin*, 6 H. & Johns., 403, the court said : "That the parties ought to have notice of the time of meeting is a position so strongly supported by common justice that it would seem not to require the aid of authorities. Every man ought to have an opportunity afforded him to be heard in defence of

his rights." In *Falconer vs. Montgomery*, 4 Dallas, 232, it is said: "The plainest dictates of natural justice must prescribe to every tribunal the law that 'no man shall be condemned unheard.' It is not merely an abstract rule, or positive right, but it is the result of long experience and a wise attention to the feelings and dispositions of human nature. \* \* \* Besides, there is scarcely a piece of written evidence, or a sentence of oral testimony, that is not susceptible of some explanation, or exposed to some contradiction; there is scarcely an argument that may not be elucidated so as to insure success, or controverted so as to prevent it. To exclude the party, therefore, from the opportunity of interposing in any of these modes (which the most candid and intelligent, but a disinterested person, may easily overlook) is not only a privation of his right, but an act of injustice to the umpire, whose mind might be materially influenced by such an interposition." In the case of *Lutz vs. Linthicum*, 8 Peters, 178, Mr. Justice Story said: "Without question, due notice should be given to the parties of the time and place of hearing the cause; and if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside." In *Elmendorf vs. Harris*, 23 Wend., 628, it was laid down as a fundamental rule of construction in reference to every transaction in the nature of a judicial proceeding, that the contract of submission necessarily implies that the arbitrator is not authorized or empowered to decide the question in controversy without giving the parties an opportunity to be heard in relation thereto.

Mr. Webster's construction of the 3d article of the treaty, which provided that the copies of the correspondence should be laid before the arbiter, excluded the presentation of any argument. But the article contains no words of exclusion, and it is not to be presumed that the arbiter would have refused to consider an argument for the claimants. The government refused to sanction in any manner the presentment of the case of the claimants to the arbiter, and without such sanction no private person would be permitted to intervene of his own authority between two nations. If Mr. Webster's construction be correct, then such a treaty, in violation of the plainest principles of justice, should not have been made. If his construction be wrong, then the agent was most unjustifiably hindered by the government from presenting his case. Whatever may be the true construction of the article, the claimants have suffered a wrong at the hands of the government, for which reparation should be made them.

We come now to the consideration of the award, and it is necessary, in the first place, to ascertain the matter submitted to the arbitrator.

The second article of the treaty is as follows:

"The high contracting parties *not being able to come to an agreement upon the question of public law* involved in the case of the American privateer brig General Armstrong, &c., have consented that *the claim* presented by the American government, &c., should be submitted to the arbitrament of a sovereign," &c.

The claim then was submitted because the parties could not agree upon the question of law. It was not because they could not agree

upon the facts or the amount of the claim. Thus *the matter in dispute* was the simple question of law. As that question should be determined, so must be the award of the arbitrator. But that question was not determined at all, the award being founded solely upon the facts. If this construction of the submission be correct, it follows that the award is void : firstly, because it does *not* settle the matter in dispute, and the matter submitted ; and secondly, because it *does* settle the question of fact which was not submitted, and thus exceeds the submission.

But there is another view to be taken of the submission. Although the question of law was that about which the parties were unable to agree, the *claim* was submitted, and this comprehends both the question of law and the question of fact. Having found the question of fact against the claimants, it is urged that this decision, involving the fact that the Americans were the aggressors, is conclusive against the claimants. Such would undoubtedly be the case if the claimants had had the privilege of being heard by laying before the arbitrator their argument and proofs. But it is to be remembered that in this case not only was the submission made without the assent of the claimants, not only were they denied all opportunity of appearing before the arbitrator, but the case during all the period from the submission to the award was in no condition to be heard. It had never been prepared for trial. The claimants had done all that was necessary for their immediate purpose ; they had presented their claim to their own government, and had requested that it might be urged upon the government of Portugal. Mr. Webster did not suppose that all the evidence had been furnished on which the claimants rested their case, for on the 15th of January, 1842, he wrote to Mr. Barrow : " If the inadmissibility of the claim is made to depend upon the defect of evidence, or upon any other cause, you will ascertain precisely what further evidence is required in addition to that which has already been communicated by Captain Reid, and will be found on file in your legation." The transaction occurred in the harbor of Fayal, near to the shore, on a moonlight evening, and in the presence of innumerable witnesses. If the facts were to be contested, the claimants should have had the opportunity of procuring the testimony of those who witnessed the affair, and of placing their case in the most favorable light. This privilege is not denied to the humblest suitor in the most petty controversy. It has been denied to these claimants by the action of their government. They are remediless as to Portugal, for all claim is barred by the action under the treaty. Their just rights have been disregarded and sacrificed by the United States ; and the question then arises whether the United States are bound to make them compensation.

In relation to this point we have the facts that the British were the aggressors ; that the owners of the brig had a valid claim upon Portugal for indemnity ; that the claim was submitted to arbitration by virtue of the power of the United States to do so, without the assent of the claimants ; that the treaty was so worded as, by Mr. Webster's construction, to deprive the claimants of all opportunity of

being heard in any manner ; that the United States refused to sanction their application to be heard ; that they were not heard ; that the award was made without their privity, in their absence, and in violation of the universal principle that no one shall be condemned unheard ; and that they were entitled to be heard upon every principle of private justice, public law, and that regard to equity and fair dealing, without which neither a nation nor an individual can ever be respected. It is entirely immaterial whether the question submitted was one of law or of fact. Even if we admit, for the sake of the argument, that upon the evidence now before us it was doubtful which party was the aggressor, and even if we admit in the same way that the validity of the claim upon Portugal was a doubtful question, that does not at all affect the right of the party interested to be heard. So much the greater call was there upon the United States to provide that they should be heard. The principles of justice are universal, and not local. They are as binding upon the emperor of the French as upon the humblest tribunal. Every step in this affair, from the acceptance of the proposal by Portugal to submit the case to the ratification of the treaty, was the act of the United States alone. The award having been made against the United States, they are answerable to the claimants for the loss they have sustained, upon the principle that a nation, being entitled to the allegiance and obedience of its citizens, is solemnly bound in return to protect not only their persons, but their property. It is said by Vattel (ch. 2, § 17): "If a nation is obliged to preserve itself, it is no less obliged carefully to preserve all its members. The nation owes this to itself, since the loss even of one of its members weakens it, and is injurious to its preservation. It owes this also to its members in particular, in consequence of the very act of association ; for those who compose a nation are united for their defence and common advantage ; and none can justly be deprived of this union, and of the advantages he expects to derive from it, while he, on his side, fulfils the conditions. The body of a nation cannot, then, abandon a province, a town, or even a single individual who is a part of it, unless compelled to it by necessity, or indispensably obliged to it by the strongest reasons, founded on the public safety."

It is on this duty of protection that the duty of allegiance depends. We owe allegiance to the country where we were born, where we were educated, and under the protection of whose laws we live. To it we owe the sacrifice of our comfort, our property, and our lives, when the occasion requires it. And it is from the existence of these comprehensive duties on our part that the reciprocal duty of protection arises. Our country is bound to protect our rights as individuals ; and if this protection be not afforded us, she is bound to render us such an equivalent as it is in her power to bestow. Against another nation she is bound to assert our claims, for she alone can meet such an antagonist on equal terms. If she neglects the sacred duty of protecting us in our rights, she is bound to make us compensation. These principles are no recent discoveries. They are as old as the institution of civil government. Their recognition by a state is the surest

and firmest bond by which the citizen is attached to his government and his country. They embody the same idea expressed by the Lord Chancellor in the case of the Baron de Bode, to which we have referred, that "if from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreigner, he (the citizen) has a claim against his own country." In the case of *Farnam vs. Brooks*, 9 Pick., p. 239, Parker, C. J., intimates an opinion that there is an obligation on the government of the United States to procure redress for its citizens, or itself to reimburse them.

In relation to the question of damages, no evidence has been laid before us. The sum claimed of Portugal is mentioned in the correspondence, but no proof of the damages sustained appears in the case. Upon this point testimony must be taken.

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IN THE COURT OF CLAIMS.

ON THE PETITION OF REID ET AL., CLAIMING INDEMNITY FOR THE DESTRUCTION OF THE ARMSTRONG.

*Brief of the United States Solicitor.—On final hearing.*

I renew my objection made at the hearing of the demurrer to the petition, and especially invite the attention of the Court to a point then made, but not noticed in the opinion denying the jurisdiction of the Court.

The case confessedly does not fall under either of the heads of jurisdiction specified in the act establishing the Court, but as it is a case referred to it by the House of Representatives, it is insisted that it may be considered by the Court; but as that clause has been interpreted by the Court, it gives it no jurisdiction, except of cases in which a strictly legal demand is presented. It remains to be considered, therefore, whether any legal demand is presented here.

The petition attempts to fix a liability on the government, on the assumption that the relations existing between the claimants and the government were analogous to those existing between principal and agent as defined by municipal laws; and for the failures, neglects, &c., of the officers of the government in the execution of their duties affecting private rights, there was the same responsibility from the government to the claimants as between individuals holding the relation of principal and agent. It is upon the maintenance of this principle that the claim of the petitioners depends.

Such a proposition only needs to be stated. The government is an agency indeed, but an agency of the whole people. Its responsibility is likewise to the whole. Its action is for the whole, even when in relation to business of individuals. The assumption here which makes it responsible to individuals would make it subject to individuals—an insufferable doctrine.

I do not think it necessary to go at large into the subject to show further how entirely unwarranted the assumption is on which this case



proceeds ; it may aid to show the fallacy of the principle to call attention to some of its results or consequences.

1. If the government, in dealing with foreign governments in relation to the rights of individuals, is the agent of the individual, and is responsible to the individual for any supposed errors or neglects, or incapacity of officers in such action, it is in like manner responsible for all such neglects, &c., whenever it acts in the business of individuals, whether by its legislative, executive or judicial agents.

Thus, (to take an instance from that department which deals more than any other with the affairs of individuals,) if the government, acting through its courts, by the mistake, negligence or incapacity of a judge, fails to obtain just indemnity from one citizen for another who has been injured, on the doctrine of agency contended for here, it would be bound to make good the loss ; and for a stronger reason than for a like failure on the part of the Executive and Senate in carrying on our foreign relations, because, in one case, there is no doubt about the power of the government to exact redress, where, as against a foreign power, it would depend on the comparative force of the governments and people.

2. Such an assumption involves the further assumption that it is proper for this Court to sit in judgment on the propriety or impropriety of the acts of the various departments and officers of the government, which are admitted to be confided by the Constitution exclusively to the discretion of such departments or officers. This, with the further assumption that the decisions of this Court are final, will absorb all the powers of the government into this Court ; and if the government is to be degraded to the rank of a private agency, I admit that properly we may sit in judgment upon all acts of the President and Senate by which the rights of individuals are supposed to be injuriously affected, all errors of our ministers abroad, all judgments of the courts, and all executive and legislative action of the same character.

But the Supreme Court has uniformly held that all official actions within the scope of the officer's power, whether legislative, judicial or executive, were conclusive of the matters, and not to be re-examined by any other authority or tribunal, unless vitiated by fraud, or unless an appeal was provided for, or other revision.—(See 6 Peters, 729, 730, and cases there cited ; also, 14 Peters, 458.)

It may be proper to say that this principle does not preclude this Court from considering the acts of such officers or departments of the government for the purpose of determining what rights of suitors or claimants are derived from them ; or, in other words, from construing such acts, but only from holding such acts as wrongful.

It is only by regarding the action of the President and Senate as wrongful in concluding the treaty with Portugal, and the conduct of the Secretary as wrongful in conducting the proceedings under that treaty, that any rights can be claimed against the United States. Is it competent for this Court to pass such a judgment on these departments of the government ? I certainly think it incompetent and improper to do so. There is no example in our history of such action by any tribunal ; and whilst I am sure the Court is far from being

wanting in respect to the President and Senate, such a judgment might be construed as derogatory to those branches of the government.

Again : If the President and Senate have the power by treaty, whether by arbitration or otherwise, to adjust or determine the validity of the claims of our citizens against foreign governments, and did in the case of the Armstrong adopt measures to that end, the lawfulness of which is unquestioned, how can such proceedings be the foundation of a *legal claim* against the government?

Much is said in the discussion about the impropriety of the treaty, and the unskilful manner in which the subsequent proceedings were conducted, &c. But the lawfulness of these acts was not and is not disputed. By what logic can a legal claim against our government be founded on the loss of a claim against another, in consequence of measures all of which were severally legal and proper, and were adopted by the departments and officers on whose judgment and discretion alone their adoption was committed by the Constitution?

The skilfulness or unskilfulness of the management, and the propriety or impropriety of the measures adopted, are not open questions. The presumption of law is, and the fact certainly is in this case, that the officers on whom the law devolves a duty and discretion are the most competent judges of the proper measures to be taken. Where, as in the case of the Armstrong, matters pertaining to our foreign relations were to be acted on by the government, to the President and Senate, and the Secretary of State and our foreign ministers the selection of the means is left. They are supposed to know what course is best to be taken, and the presumption is, and the fact is generally, that the persons filling those offices are the most skilful for the conduct of the business. Neither the Court of Claims nor any other court is presumed to know, or does in fact know, better than those officers what course is best to be taken ; nor are they supposed to be skilful, or judges of skilfulness, in conducting diplomatic business.

#### *Measure of damages.*

As respects the measure of damages, the depositions lately taken show the value of the ship to have been from \$40,000 to \$60,000. The loss of the officers and crew is run up to \$97,000 ! Unfortunately for this proof, Messrs. Haven and ———, the agents of the vessel, submitted a claim in 1814, to be found on p. —, Doc. 14, for value of the ship and outfit up to the time of sailing, of \$30,000, and for \$700 expended at Fayal.

The \$97,000 is principally of interest on the value of the clothing, &c., estimates of which are contained in various depositions.

#### *No party before the Court interested in the vessel.*

I object to any allowance on account of the vessel, because no one interested is a party to the proceeding. S. C. Reid, jr., who appears

by the testimony of Capt. Reid to be the owner of the whole, is not a party at all. It is true that he is trustee for half for the original owners, but he is the legal owner, according to the testimony, of the whole.

*Reid has no authority to claim on behalf of the officers and crew.*

I object to the claim for the officers and crew. No authority is produced on their part to any one to present such a claim. It will be time enough to consider of the claims of people when they make them. The authority shown is altogether from the owners, and that is but *partial*, I believe; and that is a transfer to Reid, sr., who has again transferred to his son. There is, therefore, no claim before the Court save of Captain Reid for his private loss.

*Interest.*

The claim for interest made in the evidence is said to be distinguished from the claim for interest in ordinary cases, for that in this case the government of the United States has been substituted for the government of Portugal, and that against foreign governments the custom has been to demand interest. I deny altogether that there is any proof of a custom to demand interest against a foreign government under such circumstances. In this case no such demand was made at any time.—(See the correspondence.)

It is true as large an amount of money was demanded of Portugal as is now asked of this government; but it was made up differently and argued differently. Against Portugal the claim was made up by a claim for *lost profits* anticipated from the cruise of the privateer. Such a claim was sufficient when made against Portugal. But as such a claim would appear ridiculous in a court of justice, it is abandoned, and a new ground of action substituted against the new party, and everything varied but the amount. Nor is there any claim for interest in the petition.

*The evidence.*

The claim rests entirely on the evidence of persons interested. The protest before the consul signed by Captain Reid and others, which the Court allows to outweigh the testimony of Captain Lloyd and the English officers as to the point of the aggression, is by parties all of whom are interested pecuniarily in this claim, as well as interested in justifying themselves.

The amount of damages is proved almost entirely by similar evidence, and Captain Reid is produced to swear *four several* times in depositions lately taken. It is distressing to see a man of his character so treated in his old age.

M. BLAIR



## IN THE COURT OF CLAIMS.

ON THE PETITION OF CAPT. SAMUEL C. RIED, CLAIMING INDEMNITY FOR  
LOSSES SUSTAINED IN CONSEQUENCE OF THE DESTRUCTION OF THE PRIVATEER  
"GENERAL ARMSTRONG."

*Brief of the U. S. Solicitor on the re-argument in January, 1857.*

## STATEMENT OF THE CASE.

The petitioner seeks to recover of the United States indemnity for losses suffered at the hands of the public enemy in time of war, by reason of the destruction of a private armed vessel placed under his command by a company composed chiefly of merchants who had fitted her out to make profits, by capturing the trading vessels of the enemy.

In support of this extraordinary demand, it is alleged that the vessel was destroyed by the enemy in a neutral port; that, therefore, the government to whom the port belonged was bound, by the laws of nations, to make good the loss; and the government of the United States was required, in fulfillment of its duty to protect its citizens, to enforce the obligation; that the government of Portugal, to whom the port belonged, failed to make good the loss, and the United States failed to require that government to perform its obligations, whereby the government of the United States itself became bound to indemnify the petitioner. See Mr. O'Connor's speech, p. 104 of the volume entitled "Report of the case Brig General Armstrong," where he says:

"The General Armstrong, whilst lying in the port of Fayal, was entitled to absolute protection from the Portuguese government. That protection was not afforded. In violation of the neutrality of that port she was destroyed by the forces of a British squadron; and for this delinquency on the part of Portugal, her owners had a perfect right, by the law of nations to be fully indemnified. The owners themselves had no legal capacity to prosecute this claim directly, but, on establishing its validity, they were entitled to redress through the action of their own government against that of Portugal. Instead, however, of prosecuting to an issue by legitimate means, the government receded from its duty in that respect and actually extinguished the claim, whereby a right has accrued to the owners to demand compensation from the public treasury."

*Principle on which the case depends.*

This statement, it will be observed, assumes in the case supposed, that the liability of Portugal to pay is absolute from the beginning, and that whenever the government of the United States is satisfied of the justice of the demand, the right to its agency to enforce the payment becomes also absolute; and that if it fails in this duty a right to payment from the public treasury accrues. The extinguishment

of the debt against the foreign government, by **any action** of the government, is evidence of such failure.

The case as thus presented depends upon the principle, that protection was due to the vessel and owners, both from Portugal and the United States, under the circumstances of this case, and that in default of rendering it first by Portugal against the English she became bound to make full indemnity ; and the United States, for the like failure of procuring indemnity from the Portuguese, in turn became bound.

The right to protection from Portugal was temporary, and only whilst within her territory, whilst the right to protection from the government of the United States goes with its citizens to all countries. (1, Blackstone, 370, 371.) But the obligation of both governments is the same in kind and degree when it exists at all, and is only distinguishable by its duration, and the same reasoning which fixes it in one case applies in the other.

*Manner in which the discussion is conducted.*

But whilst this is avowedly the legal proposition on which the case depends, but little is said in argument in support of it ; but the case is sought to be carried by discussing matters which are wholly irrelevant to this issue. Thus, much of the discussion refers to the question whether Portugal exerted all the power she possessed at Fayal to prevent the act complained of—whether England was not the real party who would be made to pay if Portugal were coerced. There is some discussion of a point which is legitimate under the issue above stated, as to who was the aggressor on the night of the 26th September 1814—Capt. Reid, or the English. But this discussion proceeds on the assumption, that the question is not one to be decided on legal principles.

But the greater part of the discussion is with reference to the management of the claim by the United States respecting the treaty ; the character of the arbiter, and his proceeding ; the evidence submitted and not submitted to the arbitrator ; the question submitted, whether the finding was within the submission, whether award should have been accepted, &c., &c.

The object of nearly all the argument in the case is to get a judgment on different principles from those avowed as the basis of liability above stated. Thus all that relates to the particular manner in which the negotiation was conducted is immaterial, because if it be true, as it is said, that the obligation of the United States is perfect to give protection and to procure redress, all that need be stated is that it has not fulfilled it. It is not essential to show the particulars of the negligence or misjudgment by which the result was brought about. But this part is more insisted on than any other part of the claimant's case, and the reason is obvious to those who have watched the progress of the case.

In the argument of the claim in the Senate, its friends put it on the ground that the government was the *agent of the claimant*. The liability was then inferred—1, because the Secretary of State had

submitted the claim to arbitration without the consent of the claimant; 2, because the Secretary had grossly mismanaged the arbitration, &c. The case was then, and at the first argument before this Court, put wholly on the ground which Mr. Bradley even now insists upon, that the government acts on this matter just as a bank would with which he had deposited a note for collection; in other words, upon the principles of private agency—a ground which Mr. O'Connor has formally and distinctly disclaimed in his printed argument.—(See p. 148.) But whilst he has thus disclaimed the principle, because on the admitted facts of his case, according to the rules which govern in such cases, there had been acquiescence in the course taken by the government, he still wishes to hold the advantage which he supposes may be derived from his imputations of negligence, &c. So that we have, in fact, two distinct and inconsistent grounds presented in support of this claim, and neither of them is relied on, but they are blended together confusedly in argument.

*Obligations of neutrals.*

I shall, before considering the legal questions in the case, make some further comments upon the manner in which it has been discussed, and the matters to which I have already referred as improperly drawn into it. Many circumstances are presented and pressed in the case which appeal to the national pride and the national antipathies, as well as to the influences which the admiration for courage exerts over noble minds. Under the influence of such feelings, a variety of subjects are brought into the discussion, to operate on the decision of questions to which they are wholly irrelevant. Thus, at the outset, in determining the liability of Portugal, although Captain Reid, in his protest, "protests against the government of Portugal for their *inability* to protect and defend this, their port and harbor," the argument is perplexed with the imputation that the submission of Portugal was unnecessary; and we have Mr. James B. Clay's argument of 15th March, 1850, quoted to show that Portugal did not exert the physical power she had at hand to prevent the violation of its territory; and yet the counsel afterwards not only implies that the local officer did all that could be done in the condition in which he found himself, but that if he had had force sufficient he would not have been justified in using it.—(See p. 119 of the report.) But still we have the idea again and again repeated, that the obligation was fixed on Portugal, because she did not use the power to which Mr. Clay alludes; and it is attempted to fortify this reasoning by quoting some remarks from a letter of the Portuguese minister, which, it is alledged, censured the authorities at Fayal for their shortcomings in this respect; and it is thought to be proved that the government did not act with firmness.

This is one way in which it is attempted to avoid the doctrine which our own government had always maintained respecting the extent of its own duties as a neutral territory under similar circumstances. See speeches of Senator Fessenden, volume 30, Congressional Globe, pages 404, 645; Senator Dawson, *ib.* 409; Stuart, *ib.* 403; Senator Pearce, *ib.*, volume 31, page 158. See, also, Wheaton's Elements of Inter-

national Law, by Lawrence, pages 497-'8, where the treaties made by the United States with England, France, Prussia, and Holland, are referred to as expressing no more than the law of nations; and by these treaties the obligation of the neutral was limited expressly to the use of *all the means in their power* to prevent the violation of neutrality, and to recover and restore the property captured; and it was only when such power had not been used that the neutral was bound to indemnify. Another way is to concede that this is decisive evidence of the "*jus gentium*" (page 121); but to insist that the qualification means nothing, and that "the rule, as expressed in the text of our writers on international law, and in these treaties, means *nothing* less than that the neutral state is bound to obtain or to make restitution for every outrage committed upon friendly nations within its limits, peacefully if it can, forcibly if it must." This is not the meaning of Mr. Wheaton when he says: "But they (neutrals) were not bound to make compensation if all the means in their power were used and failed in their effect." Mr. Wheaton and the treaties say indemnity is not to be paid by neutrals "if all the means in their power were used and failed in their effect." Mr. O'Connor says there are no *ifs* about it; they are "to obtain or to make restitution, peacefully if they can, forcibly if they must." This reading fixes the liability unconditionally, and renders all the language expressive of conditions unmeaning. Mr. Wheaton makes the liability depend on the good faith of the neutral, his ability to interpose to prevent the capture, or to get possession of the property after capture. Mr. O'Connor thinks all that refers to the duties of the courts, and has nothing to do with the responsibility of the state. But not only are the treaties, and the text of Mr. Wheaton's treatise, decisively opposed to this view of the learned counsel, but there is a letter of the treaty-maker referred to in the note, giving effect to these treaties, which accords fully with my construction. I refer to the letter of Mr. Jefferson to Mr. Hammond, of September 5, 1793, which is published in a note to one of these treaties, at page 132 of the 8th volume of Statutes. In that letter this language is found: "As to prizes made under the same circumstances, and brought in after the date of that letter, the President determined that all the means in our power should be used for their restitution. *If these fail, as we should not be bound by our treaties to other powers in the analagous case, he did not mean to give an opinion that it ought to be to Great Britain.*" And no such thing as war, as one of the means in our power, is contemplated in this letter of Mr. Jefferson to prevent liability. He refers altogether to other efforts, the action of the governors of the States, and the custom-house officers, &c., &c.

*England the real party.*

Again: we are told it is not the Portuguese government who are the real party interested, but the British government—our hereditary enemy. It is our proud, arrogant, and oppressive foe, or our insidious, fraudulent, and crafty enemy we are dealing with, and not their dependant and almost vassal—the Portuguese. But yet the liability is not fixed on Portugal because of any supposed collusion of the govern-

ment with the English in the destruction of the vessel. The interest of England in the question is stated merely to help the general argument; in other words, merely to prejudice the case before the court, as lawyers deal with juries when they are persuading them to give a verdict on an issue by matters not relating to it.

If it were only in the harangues of counsel this language was found, it might be supposed that it had no effect on the legal mind in influencing the decision of the abstract point I am referring to, but when we find that these considerations are enlarged on extensively, not only in the reasoning of those senators who have upheld the doctrine, but in the opinion of the Court, without either of them declaring that they put the decision on the ground that England is the real party, it is manifest that the feeling towards England enters largely into the influences under which the case is actually decided, although the case purports to be decided on legal propositions which are independent of the relations of England on the subject.

Nothing more clearly demonstrates that the legal mind is not satisfied with the conclusions to which the feelings influence us, than such attempts to draw into its aid such side issues.

*Who was the aggressor?—Principles of evidence.*

The same course of reasoning, or, I might more properly say, the same disregard of it, is exhibited when the evidence is treated of relating to the facts on which the liability of Portugal depends.

When, in endeavoring to consider the evidence on legal principles, I argued that on these principles the weight of testimony went to show that Captain Reid had been the aggressor in the affair, because, whilst it was admitted that he had fired the first gun merely on suspicion that the English boat or boats were approaching him with a hostile intent, the proof was positive, by those who were in a better condition to know the facts, and who were equally entitled to credit before the arbitrator, that these suspicions were unjust, no attempt was made to answer; but, on the contrary, my powerful adversary not only admitted the soundness of this argument, but proceeded to show that I had not done justice to the strength of my case on the point, by saying that under such circumstances, as the *onus* was on the claimants to prove their case affirmatively, it was impossible to maintain the case. But he said it was for that very reason that the case was improvidently submitted to arbitration. It was not a case to be determined on the principles applicable to ordinary controversies. It was a case, he said, involving the national honor, which could not be left to arbitration. Something of this is preserved in the reported speech, (see p. 137 to 140,) and the conclusion is, "how hopelessly desperate then was the case, treated as a question of fact, considering who was the arbiter, and the consequences to result from the decision. In this connexion we do not question the equal fitness of Louis Napoleon, as an arbiter, with any other European potentate. It was not to be expected that any sovereign of Europe would convict the British officers of perjury," &c. My recollection of the argument is that the distinguished gentleman admitted more than I claimed, and I claimed



that, on legal principles, before any judicial tribunal, the testimony would exonerate Portugal by showing that Captain Reid was the aggressor; and his answer was that this was so obviously true, that it was giving up the case to submit it to such an ordeal, and therein lay Mr. Webster's great error, and the ground of reclamation against the United States. But the qualification added in the printed speech, which concedes the force of the argument only when a European potentate was the arbitrator, whilst it varies the concession materially, illustrates, in its present shape even, the point for which I quote it, that the principles of law, whether applied to the evidence of the facts on which the liability of Portugal depends, or to the facts when assumed, are insufficient, and are not relied on to maintain the case.

When we attempt to discuss the liability of Portugal, on the assumption that the British were the aggressors, it is not Portugal's liability in fact, but that of the English that is insisted on. Portugal was and is a mere dependency of England. The English minister interfered, or attempted to interfere, even in Washington, with the conduct of the business, and thus the counsel for the claimant makes a lodgement with our British antipathies, on the ground that there was collusion between the British and Portuguese in the destruction of the vessel. But when he comes to argue the question of aggression, he makes the Portuguese governor and minister, neither of whom knew any of the facts except from Reid, most available witnesses, accredits them fully, and, so far from proving or attempting to prove collusion, in fact maintains just the opposite position; and that is according to the real facts of the case.

So, when we claim the legal effect of the evidence, the national honor, we are told, does not admit of the application of the rules of evidence to Captain Reid's account of the affair at Fayal, and does not permit it to be questioned. It involves American history and our national character.

It is a waste of breath to attempt the discussion of principles of law with those who make themselves parties to the suit, and who, therefore, will not or cannot decide, according to the legal principles involved, against their feelings and wishes as to the result. So, if the controversy can be converted into one involving the national honor, it is a point of patriotism to decide for the petitioner, and we must go for our country as for ourselves, right or wrong, and it is useless to consider the law points and authorities.

I do not perceive, however, any necessary connexion between the fate of this claim and the honor of the nation. I shall not disparage the achievement of the petitioner. If I cannot agree in thinking it equal to Nelson's victory, I will, nevertheless, admit it was bravely done. I am willing to accept it as Congress accepted it—as honorable to our arms. But defamation itself is not more unjust to a man than exaggerated eulogy. Every honest mind resents both—and the eulogy, not less than the defamation—if for a selfish object. But, in my judgment, Captain Reid has no share in procuring the exaggerated eulogy, as he has no share or interest in the object for which it is made. It is Lawyer Reid who now has the interest—for to him, it appears by the proof, everything has been assigned but the old

man's clothes; and the pretensions for the old captain, set up by the lawyer, to a victory equal to Nelson's, is exaggeration proportional only in absurdity to the claim set up against the treasury.

*National honor not involved.*

The old captain has, I believe, no concern in this business of puffing and claim-making. He got into a fight with the British, and having the advantage, in his vessel and arms, over his adversaries, who approached in open boats, though greatly outnumbering him, he made havoc of them with his big guns. He fought with determination and coolness, and repulsed them till they brought a large brig and bigger guns to bear on him, and then he gave up the fight. Now, whether he got into this fight unnecessarily or not, is another matter, and, so far as his courage and reputation are concerned, is, with most persons, quite an immaterial matter. If it was true that the British designed to take his vessel, he did not succeed in preventing it by making fight. The honor is rendered, and is due solely to the courage manifested in the fight, not for any foresight as to the results to be accomplished by it, or for any other results than flowed from this manifestation of hardy courage. As to the British wanting such vessels as the Armstrong, &c., everybody acquainted with the history of that day knows they had more vessels than they could man; and if they had wanted the vessel they would not have burned it. His reputation, therefore, and the honor of the country, so far as it depends on it, is not at all dependent on the fact whether he was right or wrong in his suspicions that the British meant to capture his vessel, which he conceived as soon as the English vessels came to anchor, however important that point might be in determining the question as to the right to be indemnified for the ship; and it could not take a laurel from his brow if the fact, as I believe it occurred, were acknowledged that he fired on the British boat under an erroneous impression; and, therefore, it does not dishonor us, and it could not be intended to dishonor us, that the French President found it so. Upon the same principle of regard to national honor, the fact that Captain Lloyd declared at the time, and that Lieutenant Fawcett and his men swore that Captain Reid was mistaken, is thrown out of the case. Shall we believe an Englishman before we believe an American? we are asked. I answer, the law books are silent on the point. It is admissible, indeed, to consider the motives of witnesses of whatever nation which may pervert their testimony; but the law does not allow that the testimony of English officers of high rank should be scouted out of court because it conflicts with that of the captain of an American privateer, especially when there is exactly the same reason to suppose that he would pervert the facts if against him, as we have to suppose the other would, so far as justification of his conduct is concerned, and when, besides, the American has an immediate pecuniary interest at stake, which the Englishman had not in any event.

*Submission and award.*

*So as to the submission and award:* When we claim the benefit of that, the answer is in the same style. "No American," it is said, (p.

140,) "who regards the honor of his country, will ever admit that the Senate of the United States intended to submit to any earthly arbitrament the question of national honor which Louis Napoleon has assumed to decide," &c.

In quoting from the treaty to support the view adopted by the claimant, that the arbitrator "*assumed to decide*" questions not submitted to him, the counsel extracts only so much of the second article as assigns the reasons for the submission, and then adds, "this recital proves that the intent was to refer a question of law only, not a question of fact."—(P. 134.) The whole of the article is as follows: "The high contracting parties not being able to come to an agreement upon the question of public law involved in the case of the American privateer brig 'Gen. Armstrong,' destroyed by British vessels in the waters of the island of Fayal, in September, 1814, her most faithful majesty has proposed, and the United States of America has consented, that the claim presented by the American government, in behalf of the captain, officers and crew of said privateer, should be submitted to the arbitrament of a sovereign potentate or chief of some nation in amity with both the high contracting parties."

The article itself leaves no room for inference, but states explicitly that it was the case itself, not the question of law, which was submitted. The language is so explicit that mistake is impossible on this point; and the contrary statement is like the statement that, though "the reference was to a president, the award came from a king," (p. 165,) and many other statements of the claimant's counsel at variance with the record. Besides the stipulation for the submission of the evidence shows that the facts were to be investigated. None of the correspondence would have been necessary to enable the umpire to decide the abstract question of national law.

The cause of the submission was, that the claim involved a question of law which is deemed the most important that ever was broached to all the secondary powers of the earth, being a question, in fact, on the decision of which depends the ability of such powers to maintain an independent existence. But for this, Portugal repeatedly professed a willingness to pay the demand, notwithstanding she denied the facts on which the liability was predicated.

It is repeatedly said in the argument, however, that she had admitted her liability, and also that she had admitted the facts on which this liability rests. But these statements are not warranted by the proof. The only color for the allegation is, that Portugal charged Great Britain with violating the neutrality of Fayal, &c., and demanded reparation; and the local officers of Fayal, at Captain Reid's instance, and on his representations, endeavored to prevent the destruction of the vessel, and wrote to Captain Lloyd what Reid charged; but the beginning, which decides the character of the affair, was at night, and the knowledge of it was confined to those on the brig and in the boat commanded by Lieut. Fawcett; and although the officers of the Portugal may have given credit to Reid, and, on the faith of his representations, have charged the aggression to the British, it is only by holding that they are *estopped* by the charges made under such circumstances, that any *admissions* of the law or the facts are to be

made out against Portugal from the evidence in the case. But estoppels are not favored in law under any circumstances, and to apply that principle to the expressions used in the friendly efforts made to obtain redress for us, based altogether on our own representations, is to turn the tables on our friends in the most inexcusable manner ; and to make such expressions conclusive proof of facts on which to support a naked legal liability against those who had no part in the wrong committed against us, but who were sufferers in common with ourselves in the same transaction, would be taking a most ungenerous advantage of a law of evidence if such a rule existed. But there is no such rule of law. The letters in question, if evidence at all on the claim against Portugal, are evidence entitled to very little weight, because they only prove that Captain Reid's representations were believed at a time when the other party had not been heard.

When, however, the claim was pressed against Portugal, she in turn availed herself of the defence which England had made when the claim was pressed by Portugal against her ; and no fair-minded person can complain of this, or would hold, that having insisted that the facts were against England, when acting for us against England, she should not be at liberty to avail herself of the facts on which England had relied, when we press for payment, by Portugal herself. But Portugal said she would make no difficulty on that point, if it were not that the payment of the demand recognizes a principle which puts her national existence at the mercy of powerful belligerents. None but the great military nations can *enforce* their rights, whether of neutrality or otherwise against other nations. If it is to be an admitted principle of law, that nations must enforce the observance of neutrality in their territory, the secondary nations must become parties to every war when the belligerents choose to violate their territory.

Whilst it is true, therefore, that Portugal would have conceded the facts and paid the claim, but for the principle of law involved, it is not true that she ever admitted the facts, and to have required her to admit them, and allow herself to be estopped from showing the truth as a condition of the arbitration, when it was determined to arbitrate, in consequence of the question of law in the way of a settlement, so far from being demanded by any regard to American honor, would have been, under the circumstances, absolutely disgraceful to us. I can make great allowance for the zeal and inconsiderateness for opponents which advocacy occasions ; but how any advocate even could think it proper in this great government to menace or coerce Portugal, with respect to a demand originating in no fault of that government, but on a liability, if any exists at all, incurred by her inability to protect herself from wrong, is inconceivable to me. Controversies between nations, relating to their policy, do not admit of arbitration ; but with respect to questions which do not involve the national policy, it is not only proper that an umpire should be chosen to decide them, but it would be extremely improper for a nation to push its own judgment to extremes and refuse to arbitrate.

If ever there was a case which, in all its circumstances, required this course to be taken, it was the controversy in question. No objection of national honor or national policy was made by the distinguished

Secretary who refused the overture to arbitrate. Arbitration was inadmissible with him only because the case, he thought, was too plainly with us. He no doubt thought that Portugal ought to pay, as that is the opinion of other eminent men; but that the question is so plainly against Portugal as to preclude argument is not now pretended by the counsel in this cause. Mr. O'Connor even admits, (p. 139,) "our government might fairly have submitted any mere question of law involved in the case." He adds, indeed, as a reason, "since on that part of the case error seems impossible." But the other counsel, Mr. Phillips, with more candor, fairly admitted that the question was not settled. Mr. Clayton's instructions to Mr. Hopkins, in 1849, on the subject of this claim, is comprised in a single paragraph, and refers him to the documents for information. He does not attempt to argue the case, and there never has been any argument of it from the department. The instructions are merely to press the claim. Mr. Calhoun and Mr. Upsher both refused to do even that, saying that all had been done which it was proper to do. That Mr. Webster should recede from the attitude taken by Mr. Clayton, and refer both the law and the facts to an arbitrator, was therefore highly proper. It was never suspected by the able advocates of the claim in the Senate, or even by Mr. Clayton, that Louis Napoleon had assumed to decide any question involving American honor.

In order to escape the acknowledged force of the position that it is incompetent for one department of the government to review the action of another, the learned counsel, in his eighth additional point, says the gravamen of his complaint is *the acceptance* of the reward; and as that was merely an *executive* act, and not like the treaty by which the submission was made a legislative act, which he admits can never be arraigned in a court of justice, he does not say, but implies, that an executive act may be so arraigned. If it were so, there is no ground to arraign it on, save that the decision was on a question not submitted. But besides that the treaty is explicit, as already shown, this Court is a unit against the claimant on that point.—(See Op. Ch. J. Gilchrist, p. 200.)

#### *Imputations on Mr. Webster.*

But the most reckless statements are found in that part of the argument treating of the alleged negligence of Mr. Webster, in respect to the evidence laid before the arbitrator, and his refusal to send Lawyer Reid over to argue the cause. Whilst professing the greatest regard for the character of Mr. Webster, (see p. 148,) the counsel for the claimant is not ashamed to say (at p. 132) that he failed in his duty, and "not only omitted to produce the evidence in its power, but expressly withheld it at the instigation of the adverse party." This is sheer calumny. And this is spoken of the man to whom, as Captain Reid admits in his letter of the 26th of August, 1850, he was indebted for the act of 1834, giving him ten thousand dollars; and to whom he looked "with every confidence for a final and favorable termination of the affair."

His failure to send Lawyer Reid or his written argument before the arbitrator is pronounced "one of those flagitious violations of justice against which every honest mind must revolt."

It is not easy to characterize this language as it deserves to be, with a proper regard to the decorum of the Court.

It is not certain, in the first place, that any evidence at all was withheld; and it is perfectly certain, in the second place, that Mr. Webster did not design to withhold any, and this the claimant is himself at the pains to prove at page 132; and, in the third place, the evidence which is said to have been omitted was merely cumulative; the same matters being stated repeatedly in the papers before the umpire, and the whole argument, if argument were necessary or usual, or admissible before such tribunals, is contained in the letters before him.

*As to the omission of evidence.*—By the third article of the treaty, all the correspondence between the two governments was to be laid before the arbitrator. In directing Mr. Hadduck to carry into execution that article, by comparing with the minister of Portugal the copies to be laid before the French President, Mr. Webster says: "You will understand, of course, that these copies are limited to such communications as have passed between the American legation and the Portuguese government at Lisbon," &c. Possibly the use of the word Lisbon in this connexion might be construed to have excluded the correspondence with the Portuguese government in 1814, at Rio de Janeiro. But this was obviously not intended, and Mr. Webster in a subsequent letter forwards copies of that correspondence as part of the evidence to be included. But it is said that was too late; the protocol had in the mean time been concluded between Mr. Hadduck and the Portuguese minister, and upon no other grounds it is assumed that the earlier correspondence was not before the arbitrator. Now the letter of Mr. Webster of 12th July, 1851, sending it was merely out of abundant caution. It can hardly be supposed to be necessary, and there is no proof that it was necessary, or that the documents in question were not before the arbitrator. It is the merest assumption to say that they were not. It is certain they were previously in the archives of the legation at Lisbon, by the repeated reference made to them by our representatives there; it being admitted, indeed, that the whole of it is quoted or referred to, except a letter of five lines by Consul Greaves, in the correspondence of our ministers, which was submitted to the umpire. The protocol itself is not produced to show that these papers were excluded from it; and whilst there is no reason whatever for supposing that they were not embraced in the protocol, there was every probability that they were independent of the positive assertion of Mr. Webster to that effect, contained in his letter of 27th January, 1852, (32d Cong. 1st sess., House of Reps., Ex. Doc., No. 53, p. 1,) in which, in reply to the resolution of the House "to communicate the correspondence upon which the claims of citizens of the United States have been adjusted," he communicates these papers among those upon which the claim in question has been adjusted.

But if it be assumed against this positive statement and against all probability that they were not included in the protocol, no manner

of injury can have resulted. The counsel has in vain endeavored to find some matter of evidence not supplied by the correspondence; and all that he has been able to find is, first, the five-line letter of Consul Greaves, and the importance attached to that is, that it is supposed to prove that the British were determined to capture the vessel, because they wished the use of that vessel. This is a far-fetched conclusion, and especially when they destroyed the vessel. And second, the Marquis d'Aguiar's letter of December, 1814, with respect to which it is said, (p. 130,) "some allusions to this letter were, indeed, contained in the correspondence submitted to the arbiter; but no copy of it, or of those important parts of it, was laid before him." This statement is another illustration of the remarkable inaccuracy of this argument; for "*those important parts* of that letter," which are extracted in Mr. O'Connor's speech, are not only extracted *in totidem verbis* in the despatch of Mr. Hopkins to Count Tojal of June 28, 1849, (p. 25 of Ex. Doc. 53,) but all the material parts of it are again extracted in the despatch of Mr. Clay to the Count, dated November 2, 1849, at page 45 of said document.

*Refusal to forward argument.*

With respect to the "flagitious violation of justice" in not permitting Mr. Reid to go to France to argue his case before the Prince President, and in not submitting his written argument, about which so much is said, it seems to me to be sufficient to say, that Mr. Hopkins had argued it better than Reid ever did or could have argued it. And, besides, no authority is cited to contradict Mr. Webster's statement, that such argumentation was inadmissible by public law. In the absence of contrary authorities, Mr. Webster's opinion is decisive of the point. The authorities cited relate to trials before ordinary tribunals; and whilst it may serve for an *ad captandum* argument to say that "to reject without a hearing may be well enough between a despot and his bond slave; it is not within the capacity of a judge," (p. 153;) no man of ordinary capacity can fail to discriminate between the head of the government acting as umpire between other governments, and a judge between individuals, or be misled by such empty declamation. The head of a government, under such circumstances, does not, like a judge, personally investigate the law and facts, and is not expected to do so, any more than he is expected to perform in person all the executive duties of the nation with the responsibility of which he is charged. He is expected to commit the subject for investigation to eminent jurisconsults, in whose knowledge and probity he confides, and to whose judgment he is willing to give the sanction of his government. To suppose that an individual who may happen to have an interest in the decision must be heard to make the arbitration fair, betrays an ignorance or a want of consideration as to their relations to the subject. But this cannot be charged on the counsel for the claimant. At page 126, speaking on this point, he says, when an individual has invoked the aid of his government to assert his rights against a foreign government, "the individual wrong-doer and the individual sufferer are lost sight of."

\* \* \* \* "It"—the government, in such cases—"does not act in the name or by the authority of the injured individual, but in its own name and right." \* \* \* \* "Between these high contracting parties, (as in cases of arbitration,) or high contending parties, (as in war,) is the suit and the trial. Between them must be the judgment, whether obtained by negotiation, awarded by arbitrament, or won by the sword." Again, (at page 148,) "the nation has the whole power. It is the principal, not the agent." This well expresses the relations of the government to the subject. The government is the party. The individual is lost sight of. Practically, indeed, where individual rights only are involved, all proper suggestions of the party in interest would be attended to. The officers would rely on them to procure the evidence, make their case, &c. ; but that they should permit individuals to dictate the action of the government against their own convictions of propriety, or even of expediency, would be neither right or proper. But the counsel forgets that he has made the government principal, and puts another face on the matter when he comes to treat of what he terms "the flagitious violation of justice," and would have Mr. Reid sent to the Tuilleries, in person or in print, as a matter of right, whether Mr. Webster thought it proper or not.

This inconsistency arises from the attempt to maintain the two inconsistent theories on which it is attempted to fix liability on the government, which pervade the argument—one proceeding on the ground that the government is bound to enforce the right of citizens to indemnity, or pay itself, in case of failure, no matter how caused ; the other, seeking to recover, on allegations of *special laches*, by means of which the loss accrued, on principles applicable to a mere agency. When regarded in the first aspect, it is through the right to protection, considered as a perfect right, that the claim is to be maintained. Then the government may be allowed to "be the sole judge of the measures to be adopted."—(p. 154.) It may negotiate, arbitrate, or fight, as it elects. It is even conceded "that the suitor must submit to such delay as the exigencies of the public affairs may occasion ; nor is there any greater occasion to complain of delays than belong to suitors in our ordinary courts of justice." But, if the claim be not paid by the foreigner, in the end it must be paid by the United States, because, as Mr. Attorney General Cushing, speaking of this claim, has expressed it, (vol. 7, p. 239, *Opinions Attorneys General*.) the idea is, "that if the Department of State undertakes to aid a citizen of the United States in the prosecution of a foreign claim, and does not succeed, thereupon a claim for damages arises against the United States." It is denied, indeed, by some of the numerous counsel in this case, that their doctrine is correctly stated in this passage. But the opening paragraph already quoted from Mr. O'Connor's speech (from page 104) shows that he maintains it as the essential doctrine of his case. But it is true of Mr. O'Connor's argument, as of the other counsel, as already observed, that for the most part the effort is to blend this doctrine confusedly with the special charges of neglect, mismanagement, &c., the heroism of Captain Reid, our national honor, national antipathies, and a mass of incongruous



matters, and to leaven the whole mass with it, and, by their aid, to give a force to the doctrine which, as an abstract proposition, it could never be allowed. This leads to the inconsistencies already noted.

*Liability of the government.*

But it must be manifest to every legal mind that the liability of both Portugal and the United States must result either from the duty of protecting those owing temporary or permanent allegiance, which imposed the penalty of indemnifying the sufferer when the government failed to afford the protection due, or that this relation made these respective governments the agents of the sufferer for prosecuting his claim against the parties in default, and that, as such agents, they were bound to ordinary diligence, &c., and responsible to the party aggrieved, on principles analogous to those applicable to ordinary private agencies.

It is said (p. 124) that the defence of the government has been maintained on inconsistent grounds in first insisting that the government is an agency, and that its action as such has been ratified; and, second, in insisting the government is sole judge of the claims, it will enforce the means to be used in enforcing them, and that it is irresponsible for its action to the citizens interested.

*The government considered as the agent of the claimant.*

I have never regarded the government as holding the relation of an agent to the citizens who invoke its protection, whatever the department appealed to; and my briefs will all bear witness, that if it be intended to impute the doctrine to me, that I have said nothing to justify it. What I have maintained is, that if it were to be so regarded, this claim would not be advanced, because by the principles applicable to that relation, Reid had fully endorsed all that was done, and this proposition was so manifestly true, that the consequence has been the entire abandonment of that position by the able and learned counsel, in his printed argument already noted. It is indeed perfectly manifest, that Reid wished Mr. Webster to bring the matter to a conclusion in some way, and relied with entire confidence on his judgment. He early had notice of the arrangement Mr. Webster had proposed with the Portuguese minister; he makes no objection, although the Senate had still to act on it, and did not act for months afterwards. Further, after the Senate had acted, he comes forward to aid in carrying out the treaty; wants to go to France, and to send an argument, &c. Now, if the government holds the relation of agent, as a bank, what would be said of a man who had entrusted a note to it for collection. The collection is resisted. The president of the bank, in whom he has expressed every confidence, and is his special friend, proposes to the other party, that, with the assent of the directors, he will refer the difficulty to arbitrators. The owner is notified of this before the directory assent, and he gives them no intimation of his dissent; afterwards comes forward and offers an argument, to go before the arbitrators, &c. The argument is refused, but still no dissatisfaction with the arrangement

is expressed ; and even when he cannot be heard he does not make objection, and it is only after the whole affair is over, and he finds the arbitrator has decided against him, that he complains and seeks to charge the bank. Any court would give judgment against him under such circumstances without hesitation, that would not sanction the most naked fraud. It is of no importance that he did not previously wish it referred to arbitration. He had, on the incoming of Mr. Webster, and after hearing that arbitration was again proposed, invoked his assistance with the warmest expressions of confidence in his future action and the liveliest gratitude for past services, and closed with saying : " After so much negotiation, controversy, and anxiety, for a long series of years, we *now* look to you, sir, with every confidence, for a *final* and favorable termination of this affair." All that he says in the letter in relation to the new proposition to arbitrate is, that " this mode, at best, being considered somewhat problematica , we, the claimants, would respectfully suggest, whether or not a settlement by treaty or convention may not, in *your* opinion, be preferable." Thus, whilst suggesting other modes, deferring to the opinions of the friend in whom he confided and to whom he owed so much—and this is the letter quoted to show *dissent* by the learned counsel !—(p. 149.) But he wisely concludes, I imagine, that this will scarcely make it out, and therefore denies " *in toto* the applicability of the doctrine."—(p. 148.) " The case is not one of principal and agent." " The nation has the whole power ; it is *the principal*, not the agent," he says.

*The government the agent of the people, and responsible only to them.*

He therefore comes precisely to the ground taken by me in my first brief, when I say, (see p. 98,) " that the objection that he (Mr. Webster) agreed to submit this claim to arbitration without the consent of the claimants is immaterial." I add, what has since become apparent to the counsel, and induced him to abandon the point, I believe, " that it is not sustained by the proof," if it were material. The objection was immaterial, as I endeavored to show in that argument, because the government did not bear any of the relations of agent to the claimant. It is the agent of the whole people, and I contended (p. 102) " that the doctrine that the government must pay such individual losses as may be supposed to result from the incompetency, negligence, or bad management of officers in the conduct of public affairs, was inadmissible, and a pretension never before set up." And I contended, in argument nearly as stated by Mr. O'Connor, " that the government is the sole judge what claims it will enforce ; in what manner, at what time, by what means, and to what extent it will enforce them. It may relinquish them, submit them to arbitration, and to any kind of arbitrament it judges expedient in reference to the general interests of the republic. It may accept a compromise, or it may release them without compensation, or for a consideration of benefit or convenience to the public. In fine, its power over the whole subject is claimed to be absolute in the most comprehensive sense of the word, no responsibility attaching to its action, (or, if any, certainly none *which is cognizable in this Court,*) whatever that action may be."

The reason which the distinguished counsel of the claimant assigns for the liability of the nation is, that the acts complained of "are acts of state, performed by the supreme Executive in the exercise of a high discretionary authority which no court could control or correct at the suit of an individual. Hence the liability of the nation."—(P. 142.) Again, at 143, he says: "Our claim is against the public treasury, because the injury complained of resulted from the acts of the government itself, performed through its highest functionaries, in the exercise of an irresponsible discretion. The maxim *respondeat superior* is eminently applicable to such cases. For acts of state the State itself must answer." It shows the diversity of mental constitution, that to me these reasons appear conclusive against any responsibility of the government, and especially against the assumption of authority by this Court to declare it and to adjudge the extent of it.

But my learned opponents proceed on the idea that there can be no such thing as irresponsible power under this government, and especially since the establishment of this Court. Previously, it is said, there was no resource but to Congress, but that now the government voluntarily submits to be arraigned here when its powers are improperly exercised and injury results to the citizen.

If it be meant that it is competent for this Court to consider every case where an individual may conceive himself injured by the action of any officer or department, on a subject-matter confided to such officer or department, by the laws, then every transaction of the government, whether legislative, judicial, or executive, may be questioned and re-examined here, and nothing could be regarded as concluded till passed on by this Court and by Congress; nor then, for it would still be as competent to re-examine our own action and that of Congress, as of any other officers or departments.

Such unlimited range of inquiry and action by the Court and by Congress would render the government impracticable, and is repugnant to the most essential features of the Constitution, in drawing all the powers of the government into one department, in the first instance, for revision, and, finally, for direction, if the revision be submitted to.

It is necessary, therefore, to put some limit upon the range of inquiry proper for this Court; and the Court has repeatedly announced the general principle that it would take cognizance of no case which was not, in its nature, a legal demand. That the government has not been subject to suit, generally, till the establishment of this Court, is not a matter of the least consequence as respects the principles which determine what is and what is not a subject of suit or a legal demand. The Court was not established to create any new rights, or even to give any complete remedies, but, as an aid to Congress in a class of cases; nor does the act establishing it attempt to define what are legal rights, &c., but leaves that to the pre-existing laws.

It is not sufficient, therefore, to allege improper conduct against the officers and departments of the government. It must be shown that the act complained of was such as would, according to the established principles of law, have created a right of action, or, in the language of my learned adversary, "a perfect right," according to such principles. Strictly speaking, no such thing indeed as a perfect right can exist to

the citizen from his government, because the government cannot be constrained ; and when the term is used in such connexion, the nation is considered as an individual, and it means such rights as would be perfect, by analogy, to the relations of individuals.

This is a large and useful sphere of action, giving us verge and scope for all our powers ; nor should we be tempted beyond it by the flattering appeal made to us to imitate the courts of equity, and undertake the erection of a new system of jurisprudence, under which the Court of Claims should relieve citizens from the mal-administration of the government by the various officers and departments to which it is committed by the Constitution ; in other words, to make a new government.

The objection made to the government as it is, or as I contend it is, by my learned opponents, is, that on my theory, great wrong may be inflicted on individuals by the government, unless the manner in which its powers are exercised may be subjected to review somewhere, its operation on individual rights ascertained, and unless it may be held responsible to individuals for such damages as may be thus ascertained to have arisen from the action of the government ; and it is thought to be irreconcilable with the notion of a free government that redress for such injuries should not be afforded.

Whether the government is free or absolute is immaterial in determining this question. The effect of laws, and the legal effect of competent official action, is not influenced by such considerations. The form of government varies only the extent of authority and the modes of conferring and exercising it, &c., but the obligation and effect of laws, and of the action of the persons or departments charged with administering the government, within the scope of their authority, are the same under all forms of government. The government of the United States, "though limited in its powers, is supreme within its sphere of action," and "is sovereign with respect to the objects committed to it," (4 Wh., 316) and its operation as conclusive and as little to be questioned with respect to these objects as the operation of a more absolute government—that is, of one of larger powers.

Great wrong may have been committed by all governments, and by our own as well as others, to individuals, and I have no doubt this will continue to be the case. It is to diminish this evil that limitations are imposed on authority, and the powers of government distributed into various departments ; and even that is not effectual, though it is the best practical mode of diminishing it. It is, however, admitted by our people, if not by the whole world, that our Constitution is the wisest system ever devised to diminish this evil, and "to establish justice." It gives no more power than may be usefully exercised, and places it in the hands of those whom the people esteem, and stimulates able men to labor for the public, &c. ; and by the distribution of the powers of the government, whilst securing the subdivision of labor, which is essential to perfection, it fortifies the liberties of the people by arraying all the others against any attempt at usurpation in one department. Our fathers have sought "to establish justice," and other objects of government, by a *system* which commits, in general, to wise men, the power which must be committed to

some hands, and surrounding its exercise with all the safeguards which experience had suggested as useful; and though there may be instances in which the system has not worked well, and according to the design, yet it is acknowledged on all hands that the *system*, as a system, is successful. This is enough. It is all that was or ought to be expected; and whilst, therefore, it may not in fact be true that the judgments of all the courts established, and all the decisions of executive officers and departments, and enactments of the legislature, are what they ought to have been, yet the actual working of our government, more than any other perhaps, justifies the principle asserted of all governments, that such decisions and actions, &c., when within the jurisdiction and competency of the officers, judges, or legislatures, must be taken as just and true in legal contemplation. As already observed, this is absolutely true in the main, and is practically indispensable to the conduct of affairs, and though in cases it may work hardship, that is true of every principle of law and government.

The contest here is on the allegation of a particular hardship to subvert the system by denying the principle on which it depends, that an act done by a department of the government, within the scope of its constitutional authority, is to be deemed and taken to be done as it ought to have been done. But whilst this is undertaken on the pretext that irresponsible powers are inconsistent with free government, it does not seem to have occurred to the learned counsel that they do not abridge the power, but merely regulate its exercise by the discretion of the Court of Claims, instead of by the discretion of the officers and departments which it is vested by the Constitution; and that though it is inadmissible to assume it as a legal proposition, that the departments have not done wrong in matters confided to their discretion, it is allowable to assume that this Court can do no wrong.

The complaint is, "of acts performed by the supreme executive in the exercise of a high (and irresponsible) executive authority."—(Pages 142, 143.) Not that they were not within the scope of the authority of the Executive, but that he did not exercise the authority as he ought to have exercised it under the circumstances; that a different result ought to have been accomplished, and that in fact it was exercised so as to result in benefits to others and to the public, instead of benefiting him, as it ought to have done. This, if true, would be a case of hardship, but it is no impeachment of the legality of such acts, and if, in arguing, they are so characterized, it is a misapplication of terms. The proceedings were authorized, and therefore lawful; and this is not less true, if we should deem them unjust to the whole extent insisted on by the claimant's counsel, for that is merely matter of individual opinion. When the laws intrust a subject to the *discretion* of an officer, or tribunal, or legislature, the decision of such officer, or tribunal, or the action of the legislature, is conclusive. "Nothing can be more clear," says the Supreme Court, in *Marbury vs. Madison*, "than that in cases in which the Executive possesses a constitutional or legal discretion, their acts, (those of the heads of departments,) are only politically re-examinable."

In 2 Peters, 412, in the case of *Satterlee vs. Matthewson*, the Court say: "Now this law has been censured as an unwise and unjust ex-

ercise of legislative power," &c. \* \* "All this may be admitted, but the question is, does it impair the obligation of the contract?" &c.

In *Elliott vs. Peirsol*, 1 Peters, 340, the Court say: "When a court has jurisdiction it has a right to decide every question in the case, and whether its decisions be correct or not, its judgment is regarded as binding," &c.

In *United States vs. Aredondo*, 6 Peters, 729: "It is an universal principle, that when power or jurisdiction is given to any public officer or tribunal over a subject matter, and its exercise is confided to his or their discretion, the acts so done are binding, \* \* whether executive, legislative, judicial or special." This Court has decided the same principle in a number of cases, beginning with *Thomas*'.

The call upon the government in this case for its intervention was confessedly addressed to the *discretion* of that branch of the government to which such subjects belonged. And "a right," says Vattel, § 17, "is always imperfect when the obligation which answers to it depends on the judgment of another." Such was, therefore, the character of the right which the petitioner had to the protection or intervention of the government. What was to be done, under the circumstances, in the discharge of the obligation of the government, to protect the petitioner, was a question addressed to the sound discretion of the political department of the government. What was done may be thought now inadequate to the occasion, or unjust to the party; and so we might have thought of the action of the judicial department, if his case had been one which required the intervention of that department, instead of the political department of the government. And it would be not more unbecoming in us to say so, than it would be to characterize in that way the action of the political department. No one ever thinks of charging the government with a loss incurred by any erroneous decision of a court to which he has appealed to render him justice. If the Armstrong had been captured by the British, and afterwards brought within the jurisdiction of a court of the United States, and an erroneous judgment had been given against the petitioner by the court on a trial of his right of property in the vessel before it, no one would suppose the government bound to make good the loss occasioned by this erroneous and unjust judgment. In such a case the judiciary is the appropriate branch of the government to apply to for protection. The question is not varied by the fact, that the circumstances of the case required the intervention of another department having a different mode of procedure, but the same object—the protection of the rights of our citizens. Both departments are bound to do justice to our citizens, and to protect them in their rights in the cases falling within their respective jurisdictions, and the obligation is no greater upon one than the other. Both represent the government, and exercise a supreme and irresponsible discretion within the sphere of duty assigned to them by the Constitution. It was said, indeed, that Congress in one case—that of *Matthew Lyon*—had in effect reversed the decision of the courts by repaying the fine, &c. But this was expressly on the ground that the courts had transcended their powers; and therefore, the case falls

within the exception mentioned in 6 Peters, of want of power in the officer.

That was a case, too, in which the government was a party to the suit. It might have said that there are many cases, too, where other fines and forfeitures, accruing under constitutional laws and imposed by the courts, have been repaid under special enactments. But they were cases in which the government was plaintiff, and the persons to whom the favor was accorded were defendants, and the payment was an act of favor, not the discharge of an obligation. But here we are asked to impose a penalty on the government for laches, not to repay either as a right or a favor what it has received. No precedents were shown for the allowance of such a demand against this or any other government, and in response to my demand for such authority to justify the allowance of this claim, the demand was evaded, and it is said I required cases from the books of the common law; that the requirement was therefore unreasonable, &c.; that such precedents were not to be expected; that this Court was new in principle, and was "the first-born of a new judicial era."—(P. 105.)

*De Bode vs. Regina.*

This substantially admits that the demand itself is the first-born of its kind. No attempt was made to produce a precedent, and no authority of any kind was adduced to support the principle on which it was founded, save the *dictum* of Lord Chancellor St. Leonard, in the case of *De Bode vs. Regina*, before the House of Lords, reported in 16 Eng. Law & Eq. Rep., p. 23. The case was a petition of right. The petitioner, who was born in England, had claimed an estate in France, which had been confiscated by the republican authorities in 1793. A sum of money was paid by France to indemnify English subjects in such cases, and a statute was passed by parliament to regulate the disposition of the fund, and commissioners were appointed to carry it into effect. The commissioners acted, rejected the claim of the petitioner, and paid over a balance of the fund remaining, after paying such claimants as they deemed entitled, to the lords of the treasury.

The petitioner sought to charge the fund in the treasury with his claim, as one coming within the provisions of the treaty.

Whilst the attorney general was insisting in argument, that, if the money was still held in trust by the Crown for an unsatisfied claimant, that would not dispense with the necessity of proving a claim to it, in the manner required by the statute, the lord chancellor interposed and remarked: "It is admitted law, that if the subject of a country is spoliated by a foreign government, he is entitled to obtain redress from the foreign government, through the means of his own government. But if from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country. Here is a compromise of the two governments; the question is, how far his claim is affected by it?" The reply of the attorney general was: "The question has not been put in that way," &c.; in other words, that there was no such ques-

tion as that stated by his lordship before the house. There was no claim made except against the fund actually received by the government. Nothing was said in the argument or by the judges, as to "how far the claim was affected by the compromise between the two governments," which the chancellor states to be *the* question. The only question argued, and the only question decided by the judges and the house, was, whether the petitioner could claim otherwise than under the statute. This shows that this singular remark of his lordship was wholly foreign to the case before the house, and that the principle he announces as "admitted law," is not admitted by the decision in that case, nor have the counsel been able to produce a single case, either legislative or judicial, which admits it, nor is the principle recognized in any treatise.

*Speculative reasoning.*

These are the sources of information as to what is law; and as they furnish no trace of any such law, the conclusion must be that his lordship is misreported or mistaken; and this conclusion could be strengthened, perhaps, by showing the proposition to be untenable or speculative reasoning. But when everybody knows that governments do not indemnify their citizens for injuries they receive for which they fail to procure indemnity from the wrong-doer, whether foreign or domestic, and whether he be an official or unofficial person, it cannot be necessary to discuss the subject on abstract principles.

Government is a practical business. The duties and obligations of governments are defined by usage, not by speculative reasoning, which, though in some respects useful, cannot be permitted to guide in the science of government with more safety than in other sciences. Mere philosopher-governments, indeed, have not been wanting to show the utter failure of mere speculative reasoning as a guide in that science as in all others. It is but twilight out of the presence of facts and experience, and therefore the effort is unavailing to lead the mind to a conclusion respecting the extent of the obligations of government by speculative reasoning, founded on the nature of the relations between the government and its citizens, without examples or analogies to justify it, or to show that experience has taught such conclusions to be admissible with safety to the body politic. No sound judgment will admit a conclusion on such reasoning. The absence of precedents on a subject, when a day would not pass without them if the principle on which the claim is founded were sound, is perfectly conclusive to a practical mind against the soundness of the principle.

It is said (p. 124) "there is no lack of precedents." "Half the diplomacy of nations has been devoted to obtaining securities for their merchants—half the treaties on record for ascertaining dues," &c. If these were precedents, the claimant's case is not *half* stated; it ought to have been said that it was the *whole* business of the government to protect its citizens, and *all* of its treaties, laws, wars, &c., were for that object. But to make a precedent for the case before us, it must be shown that it has been decided that the obligation which corresponds with this acknowledged duty is a penal obligation, the condition of which



is, that government shall pay the losses incurred by the nonfulfillment of its duty, and that the social compact has been practically construed to be not merely mandatory on the government established to use the powers and means at its disposal for such objects, according to the best judgment of those exercising it, but is an agreement for absolute security against injury to person and property by evil-disposed persons or governments, and is in fact a sort of mutual insurance company. But this is not the nature of government.—(See Lieber's Political Ethics, part 2, 189.)

### *Diplomacy.*

Nor does the history of the diplomacy to which the learned counsel refers as furnishing his precedents, recognize any such obligation, but the contrary. And especially is this shown by the action of the government in relation to the procurement of indemnities. For example, with respect to the numerous treaties negotiated by our government by which indemnities have been obtained, it not only shows the exercise of absolute authority of the government over such claims to demand, compromise, and release them on such terms as were to be deemed just and expedient by the political department, but the total exemption of the government from liability in respect to its action, which is, indeed, but the logical consequence of the possession of such power. Thus the first treaty made by the government—that recognizing our independence—contained an express stipulation (see 7 art., p. 83, vol. 8) that his (British) majesty should withdraw his forces, “without carrying away any negroes or other property of the American inhabitants.” In violation of this provision the British commander, Sir Guy Carleton, carried off as many as three thousand negroes. The continental Congress remonstrated, and claimed the performance of the treaty in the restitution of the slaves, or that the British government should make compensation. The British government refused to do so. The new government of the United States renewed the claim, but in vain; and it was surrendered and abandoned by the commercial treaty of 1794, (vol. 8, p. 116;) yet no one ever thought of holding the government of the United States liable to the individual owners of these slaves for failing to collect the debt which Great Britain unquestionably owed for these negroes.

The government has also from time to time asserted other claims for its citizens against other governments, which have been abandoned in whole or in part.—(See treaties with Spain, February 22, 1819, vol. 8, p. 252; February 17, 1834, ib. p. 460; with Denmark, March 28, 1830, ib. p. 402; with France, July 4, 1831, ib. p. 430; with King of the Two Sicilies, October 14, 1832, ib. 442; with Mexico, April 11, 1839, ib. 526; and 15th article of treaty of February 2, 1848, vol. 9, p. 933.) These treaties all exonerate these governments for the claims against them by our citizens—receiving in some instances an amount which the United States is to distribute among the claimants; and in the case of Spain, receiving the Floridas, and agreeing to distribute among the claimants against Spain a sum not exceeding \$5,000,000. In but one instance, I believe, did the amount received and agreed to

be distributed pay the full amount of the claims, and in some of them less than a third part of the amount which had been demanded of the foreigner, and which was proved up before the commissioners, was paid. Yet in all these cases the treaty was made, and the amount was received, without any other sanction of the parties interested than was implied from their relation as citizens of the United States. But no one ever imagined that the government was liable for the difference between the amount claimed and proved up, which the government had demanded and released, and the amount actually paid to the claimants, and undoubtedly the two-third part released without consideration was as valid as the one-third part which was paid, and, without absolute power to surrender the whole, the government could not have released two-thirds of a valid claim without responsibility; and certainly there would be the same propriety in revising the action of the political department, and calling the government to account with respect to these claims, all of which were surrendered directly and avowedly for the purpose of preserving the amicable relations between the high contracting powers, as there is for calling the government to account for the release of a claim by operation of a treaty for arbitration.

*De Bode's case again.*

The case itself of De Bode, referred to by the claimants for the *dictum* of the chancellor, above quoted, bears directly on the point, and shows the absolute authority of the political department of the government, and the conclusiveness of its action with respect to the claims presented by the government against foreign governments. The question decided in the House of Lords, I have already stated; but the judges, whose opinion was given to and adopted by the house, say, "we have not thought it necessary to state our reasons in detail, because we unanimously concur in the judgment pronounced by the court of exchequer chamber, and in the reasons given for that judgment."

The decision of the court of exchequer is reported in the 13th vol. Ad. & Ellis, vol. 66 Com. Law Rep., p. 363. Many question are considered, as whether an appeal lay in the case from the Queen's Bench; whether the petition was the appropriate remedy, &c.; but at p. 382 the court says: "In our view of the case, we need not give any opinion whether the petition of right is the remedy applicable to the recovery of money from the Crown, \* \* and it is unnecessary to consider whether the petition was defective. \* \* \* Assuming that all the objections made in these respects to the suppliant's right to recover are untenable, we are still of opinion that our judgment must be against him." After referring to the treaties, the court proceeds: "When the French government performed their part of the treaty, all their liability to the individual British subject was at an end. Every subject was bound by the treaty of his sovereign in relation to France, just as if he had been a party to it himself. \* \* \* Supposing that the moneys were all received from the French government, and by them paid to the sovereign of England, and the French government

to be entirely released, what would be the position of the unpaid claimants? \* \* \* If no act of parliament had passed for the application of this money, it might have been a question whether the British sovereign could have applied it to any purpose that he chose ; it might have been contended that as it was received by him expressly as the price of a release of the French government from its obligation to compensate his subjects for their losses, he took the money, clothed with a similar obligation to distribute it amongst his subjects, by way of compensation ; and that if he had been a private person who had received money under the like circumstances, such a trust would have been implied, and might have been enforced in some way according to the circumstances, either in a court of law or one of equity ; and, if so, that such subject has a remedy by petition of right. But it is unnecessary for us to give any opinion on this supposed case ; for parliament, which was unquestionably competent to dispose of all the money as it thought fit, and might have applied it to the public service of the year, or given it for any other purpose, and so disappointed the just expectations of the claimants, has provided for the application of the fund by Statute 59 Geo. III, ch. 31, and the case turns entirely on the construction and effect of that statute."

This shows, first, that the owners of claims had a legal capacity to prosecute their claims directly against the foreign government ; second, that the government has an absolute right to treat, and may extinguish and release by treaty, all such claims ; and the assent of all citizens is presumed. Third, that whilst money which was received by the Crown on account of such claims, if the parliament or political department took no action for the disposition of it, might be regarded as held in trust for the claimants entitled to it, and the trust might in that case be enforced by a petition of right ; yet, if the political department acted, and either prescribed terms on which the claims for which it was received should be paid out of it, or made other dispositions of the money, that such terms must be complied with by the claimants, and it would make no difference whether there was but one claimant, and there was ample funds to pay his demand. If he has not complied with the terms prescribed by the political department, whether such terms be in themselves just or unjust, he has no right, and he would have none, say the court, even in the extreme case supposed, of a total misapplication of the fund received on account of such claims to the public service, because it was competent for parliament to make that disposition of the fund, though unjust in it to do so. And the reply of Maule, J., to a suggestion made by Sergeant Manning, similar to those made in this case, gives the reason. When the Sergeant said that it was not necessary to show a legal right to maintain their petition of right, the judge replied, that "neither the Queen's Bench, nor any other court of law, administers justice in general ;" and when he speaks of the Queen's Bench, or any other court of law, the case shows he does not mean a court of law as contra-distinguished from a court of equity ; because it is admitted, by the opinion of the court above quoted, that if there was a right either in law or equity, the petition of right would reach it ; and therefore the remark applies to every tribunal which professes to be governed by legal principles.

There could not have been therefore a more unfortunate citation for the petitioners than the case of De Bode.

*Chief Justice Parker's dictum.*

Chief Justice Parker is quoted (page 123) as saying, in *Farnam vs. Brooks*, 9 Pickering, (page 239,) that, in such cases, there rests "an obligation on the government of the United States to procure redress for its citizens, or itself, to reimburse them;" whereas the chief justice said, "*perhaps* there was an obligation," &c.; and adds, "but the expectations of this were so small that claims thus situated were thought to be of little or no value," and, "except for the purchase of the Floridas, a political measure, probably, of great wisdom, they would not be thought of even now." The import of this is altogether different, to my mind, from that of the language quoted. As quoted, he is made to state, in the most unqualified manner, that such an obligation existed. He states it, in fact, as a right so questionable as to be of no value till it fell in with the policy of another more important political measure to procure the payment of the claims. And this gives the true account, not only of that, but of most of such transactions.

*French spoliations prior to 1800.*

There is a class of claims which have been pressed upon the political department of the government for many years, known as the claims for French spoliations prior to 1800, to which there is a feeble effect to make this analogous. That class of claims is put on the ground that the United States actually received the indemnity from France which is claimed—not indeed in coin, as the English government did under the treaty to which the De Bode case refers, but in its equivalent, in the form of an offset for claims which France had against us. Mr. Webster, in his great speech on behalf of these claimants, says: "These claims do not rest on the ground of any neglect or omission in demanding satisfaction from France. That is not the ground. \* \* But France had her subjects of complaint against the government of the United States, which she would neither postpone nor relinquish, except on the condition that the United States would postpone or relinquish these claims. And to meet this condition, and to restore harmony between the two nations, the United States did agree, first, to postpone, and afterwards to relinquish the claims of its own citizens. In other words, the government of the United States bought off the claims of France against itself by discharging claims of our citizens against France."—(Cong. Globe, 1835.)

I have already shown, that if this allegation were true in point of fact, and the political department had been as unjust as it is charged with being, that no claim in the nature of a legal claim would result against the United States any more than such a claim would arise from the mistake or injustice of the judgment of a court of the United States; nor is the reason invalidated by a change in the nature or degree of the injustice, or by its being alleged that the judgment or

proceeding was in conflict with the principles or letter of the Constitution, or of any other law. If the decision or action of a department of the government, within its jurisdiction is to be deemed legal in any case, it must be so regarded in all cases. If a treaty which surrenders part of a claim is to be deemed lawful, and the considerations and reasons, whether good or bad, are not to be inquired into for the purpose of questioning its legality in any tribunal, the same principle extends to cases where the whole claim has been surrendered, whatever consideration may be alleged for its action ; and when it is said this or that principle of the Constitution or of the law was violated, as that private property was taken by the President and Senate, and no provision made to pay for it, the treaty itself is conclusive against the allegation in every tribunal of the government. It is true that the Constitution forbids this ; but who is to judge whether the Constitution is complied with ? Undoubtedly the officer or department on whom the duty is devolved. This principle is affirmed in the cases already cited from the 6th Peters, &c., which makes the judgment of all officers and departments in whom a discretion is vested conclusive in all other tribunals. It is also affirmed in the cases of *Foster & Elam vs. Neilson*, 2 Peters, 254 ; *United States vs. Percheman*, 7 ib. 86 ; *United States vs. Arredondo*, 8 ib. 711 ; *Poole vs. Flegger*, 11 ib. 210 ; *Garcia vs. Lee*, 12 ib. 511 ; all of which are referred to as sustaining the principle ; *United States vs. Reynes*, 9 Howard, 153. The question to which these cases refer was a dispute between the United States and Spain, as to the ownership of the land between the Mississippi and the Perdido rivers. This question involved the rights of property of individuals, some of whom claimed under one government and some under the other. But as the subject of boundary belonged to the foreign relations of the government, it devolved on the political department to settle the question, and that department having decided it, every other tribunal under the government was bound by the decision.

And in De Bode's case, as already shown, where the extreme case is supposed, of the actual receipt of the money by the government on account of the claims, and its total misapplication by the political department without its being competent for a judicial tribunal to question the *legality* of the proceeding, however apparent its injustice.

It is clear, therefore, that the French spoliation claims do not rest on any *legal* ground, and the managers of that immense interest, who have the aid of the best legal talent in the country, have recognized this fact by not presenting it as a legal claim to this Court. It has been called "essentially a judicial question ;" but Mr. Webster, who uses the language, had a mind too clear to suppose that the claimants had in any sense a *legal* right. What he means he explains immediately, by saying that "it is not a question of public policy, but a question of private right;" \* \* \* "and there is a propriety (he thinks) in commencing the examination of these claims in the Senate, which cut off all hopes of redress from France. The claims, as claims against our own government, have their foundation in the acts of the Senate itself ; and it may certainly be expected that the Senate will consider the effects of its own proceedings on private rights and interests with that candor and justice which belong to its own high character."

This statement is conclusive of the character of the right asserted. The question may be judicial in so far as it affects private rights, and that is the only ground upon which it is said to be judicial. But as the complaint is not of any illegal action, and as the relief asked for is from "*the effects of the acts of the Senate itself*," which are recognized as valid and subsisting; it is the legislative discretion alone which is addressed. And if it were true, as charged, that Mr. Jefferson and the Senate had "bought off the claims of France against the United States by discharging claims of our own citizens against France," there would have been manifest justice in the claim. But this was mere partizan clamor, which then and since has, like other unfounded clamor, received the countenance of eminent and pure men who were unconsciously actuated by partizanship. The early debates on the subject of our relations with France conclusively show this.

This and the immense and widely diffused interest involved and held largely in the cities, whereby the advocacy of the great lawyers of the country who have represented these cities has been secured, has kept these claims alive for nearly sixty years, and nothing but their inherent defect of justice could have rendered this combination, and the continued efforts of the mighty men pressed into its service, unavailing during that long period.

But if the French spoliation claims were tenable, there is no analogy to them in this. Thus, to make a surrender of the claim, claimant's counsel is forced to take the desperate position of insisting that the treaty to arbitrate was intended to surrender the claims and "all that followed was merely 'leather and prunella'—the mere ceremonial of the release. Louis Napoleon was the scrivener chosen by the high contracting parties to select the phrase and apply the forms required for a solemn authentication of their preconceived design."—(P. 160.

Having thus made the unqualified charge, that if the facts were to be submitted to the umpire, it could only have been done on the *preconceived design* of abandoning the claim, and that the forms of arbitration were merely a pretence, the counsel became apprehensive that the Senate might think this unseemly language in a claimant; he says, "we do not mean that in a common or vulgar sense our government designed this relinquishment, but it is sound law, and conformable to reason that parties are held to extend the necessary results of their acts," and then affirms that such result was "plainly manifest to the commonest understanding." So the preconceived design charged was, after all, the want of the commonest understanding. Having charged the Executive and Senate unqualifiedly with being knaves, he thinks that is perhaps vulgar, and says he does not mean that, but only that they were fools.

But a surrender is not sufficient. The receipt of an equivalent by the government for its own use must be made out to complete the analogy. But as it is not pretended that Portugal paid us anything on this claim, or surrendered any equivalent claims as a consideration for the supposed release, the analogy fails entirely.

But the counsel is not discouraged, but returns to the charge with the allegation, that if we did not receive something on account of the claim belonging to his client, we did receive something belonging to

other claimants, and we elected to take them and preserve the public peace in preference to enforcing his claim. The receipt of money on account of other people was never yet accounted a ground of liability; and the circumstance that money was received from Portugal for others has no more bearing on the question here than if the money came from France. Nor is the fact that the proposition to pay them, and to arbitrate the Armstrong case, was one proposition of the least importance, unless it be true, as charged, that the arbitration was a mere form, and designed as a pretext for the relinquishment of the claim. It is, therefore, but the reproduction of that argument; and so of the other element of the consideration for the agreement to arbitrate, viz: that it was to preserve peace. This is but the assertion in another form that the government was bound to collect the claim, and that if it failed it was liable. Nor is this the French spoliation argument. Mr. Webster, in the language above quoted, expressly disclaims resting his case on such grounds. If, therefore, it was proper to arbitrate, and the government was not bound to make war for the claim, it could not be improper to decline making war, and to agree to the proposition to arbitrate, when that proposition was made by Portugal in a manner to evince the disposition of that government to make any concessions consistent with her national existence to avoid war or a rupture with us. The offer to pay those claims, the justice of which she also denied, but which did not involve such important principles, was not properly included in the offer to arbitrate this, because it showed the sincerity with which she asserted the importance of the political principle involved in this case.

And when it is remembered that the amount, if justly due, was of little importance to a government even of as little wealth as Portugal, and that the amount paid by her on account of the other claims was upwards of \$90,000—about three times the sum demanded on account of the Armstrong by her agents (see letter of Messrs. Jenkins & Havens, in Senate Doc. No. 14, 1st sess. 29th Cong.)—the offer was conclusive evidence that the Portuguese government denied the arbitration solely on account of the principle involved in the claim, and because they sincerely believed it untenable before any impartial tribunal.

This argument would seem to be unnecessarily extended to many legal minds, and, but for the circumstances of this case, I could not justify its length. But a studied effort is made to overthrow the received maxim of law, that no *laches* are imputable to the government; (see Attorney General Cushing's opinion in Whitman's case, Senate Doc. 30, 3d sess. 34th Cong., p. 90, and cases there cited;) and the success attending that effort in producing a division of the Court seemed to require that the doctrine should be explained, and be shown to be as applicable here as under other governments and in other courts.

M. BLAIR.

*Argument of Sam. C. Reid, jr., before the Court of Claims, in the case of the private armed brig-of-war General Armstrong, on a rehearing, January 27, 1857.*

THE CLAIMANTS OF THE BRIG GENERAL ARMSTRONG *vs.* THE UNITED STATES.

IN THE UNITED STATES COURT OF CLAIMS,  
January 27, 1857.

The Court having previously notified the counsel in this case that it desired to hear further argument before it rendered its final decree, Mr. Reid proceeded as follows :

May it please the Court :

In compliance with the desire of your honors to hear further argument in the case of the claimants of the brig General Armstrong, I shall, in accordance with its suggestions, confine myself to the two points indicated, presuming the facts to be admitted :

First. As to the power of the Court and the extent of its jurisdiction ; and,

Second. As to the political obligation and legal responsibility of the government to the claimants.

As to the power of this Court, I shall endeavor to show that it extends to the highest jurisprudence known to our country ; that it was created and established without the trammels and limits of ordinary courts of law, so that the rights of citizens of the United States should receive the due administration of justice. By the act establishing this Court, it will be seen that it is the only tribunal ever created whose powers are unfettered and unlimited. All other courts, created by the federal government, or by the States, have their powers strictly defined. The judicature of this Court is not defined ; neither is it confined by the expression of a single word in the act. It is neither prescribed by limits as a court of law nor as a court of equity. It is invested with but one general organic power of jurisprudence, and that power, delegated to it by Congress, was given to extend the *establishment of justice*.

The duties of the Court, however, are defined, and made imperative. The first section provides for every possible claim which can be made, in good faith, against the United States, either legally or morally, in conscience or equity. It says : " And the said Court shall hear and determine all claims founded upon any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which may be suggested to it by a petition filed therein ; and, also, all claims which may be referred to said Court by either house of Congress."\*

Is there any possible case which this clause does not cover ; " any claim founded upon any law of Congress ;" " upon any regulation of an executive department"—which means any act of an executive department—by which the citizen may be injured or aggrieved ? This

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\* See resolutions of the two houses of Congress.



is clearly the true interpretation of the purview of the act, and is qualified and explained by the following clause: "or upon any contract, express or implied, with the government of the United States." The executive department, in this sense, is the government of the United States; for it is clear that no contract, *quasi* contract or obligation, could possibly result from a mere regulation of an executive department, unless it was held to be an act of the executive.

But to establish beyond all doubt the intention of Congress to give to this Court jurisdiction of the highest equity, the concluding part of the sentence, "and, also, all claims which may be referred to said Court by either house of Congress," makes it the duty of this Court to entertain any character of claim that Congress may please to send to it for investigation.

Again: this section declares "it shall be the duty of the claimant, in all cases, to set forth a full statement of the claim, and of the action thereon in Congress, or by any of the departments, if such action has been had." Now, I ask why Congress imposed on the claimant this imperative duty, if it had not for it some special object? That object is free from ambiguity, and is apparent and patent. It intended that the proceedings of Congress on any claim should fully appear; while it determined, at the same time, that the action had by any of the executive departments upon a claim should be fully set forth, in order that if there was error committed the court should take cognizance of it, and make the government responsible by granting relief.

To confirm the intention of Congress that the Court shall take the most equitable view of all cases that come before it, the fourth section says: "*And be it further enacted*, That in all cases where it shall appear to the Court that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not be the duty of the Court to authorize the taking of any testimony in the case until the same shall have been reported by them to Congress, as is hereinafter provided: *Provided, however*, That if Congress shall, in such case, fail to confirm the opinion of said board, they shall proceed to take the testimony in such case."

By this section it was the manifest intention of Congress that, even if the Court did not find the claimant entitled to relief, after a review of the case by Congress, and it should determine otherwise, the Court is compelled to entertain the case upon testimony to be taken. The Court will mark particularly that the word *relief* is used in the clause; so that, if the Court should be of the opinion that the claimant was not entitled to recover, under the strict iron rule of the law, yet if there be justice and equity on his side, the Court is called upon to determine the case upon the facts, which, in conscience and equity, would call for the interposition of Congress.

Under the seventh section, the Court is required "to report to Congress the cases upon which they shall have finally acted, stating in each the material facts which they find established by the evidence, with their opinion in the case, and the reasons upon which such opinion is founded."

And this section further states: "And said Court shall prepare a bill or bills in those cases which shall have received the favorable de-

cision thereof, *in such form as, if enacted, will carry the same into effect.*" This directory clause gives the Court the power to frame a bill either based upon the strict letter of the law, or for relief upon the justice and equity of the case.

But if there be any doubt in the mind of the Court upon the interpretation of its powers, as construed under the sections of the act already cited, the 9th section vests the Court, beyond all cavil or equivocation, with the broad equity jurisdiction claimed for it. It says: "*And be it further enacted, That the claims reported upon adversely shall be placed upon the calendar when reported, and if the decision of said Court shall be confirmed by Congress, said decision shall be conclusive; and the said Court shall not at any subsequent period consider said claims, unless such reasons shall be presented to said Court as, by the rules of common law or chancery in suits between individuals, would furnish sufficient ground for granting a new trial.*"

By this section the Court has the power to review and reverse its own adverse decisions, even after their *confirmation by Congress*, upon such reasons being presented to the Court, "*as by the rules of common law or chancery in suits between individuals would furnish sufficient ground for a new trial.*"

This is the first provision ever made in the annals of jurisprudence in any country that, after an adverse judgment shall have been confirmed by a supreme tribunal, the claimant shall be permitted to obtain a rehearing in the court of the first instance, upon rules governing a court of equity. It is the most unprecedented power ever conferred on any court since the establishment of this government. And Congress, in its wisdom, fearing that an oppression or wrong might be inflicted upon the just rights of a claimant, has, in the plenitude of its lenity, and for the sake of humanity, conferred this highest of all equitable powers upon this tribunal.

This, consequently, is a national court, with unlimited power and jurisdiction to hear and determine all claims of every nature whatsoever arising between the citizen and the government, whether growing out of statute law, treaties, contracts or *quasi* contracts, or obligations founded on *international law*; and whether the amount involved be one cent, or millions of dollars.

This Court has full and *entire* jurisdiction, then, of the case under its consideration, by the express declarations of two clauses under the first section of this act: *First*, by reason of an *implied contract* on the part of the government, which undertook to establish for *itself* a recognized principle of international law, and under which it asserted the responsibility of a neutral power, in which the rights of the claimants were involved. This was its duty as a nation, in order to preserve intact its honor and respect, while at the same time the obligation rested upon it to protect and procure indemnity for its citizens. *Secondly*, because Congress admitting and asserting the principles of law to be correct, yet, on account of some disputed facts, this case was sent before this tribunal for its investigation, and to inquire into the action had by the executive department.

The power of this Court, then, and its jurisdiction, is not merely confined to cases arising under the statute laws, or contracts with the

government, but it extends to the great law of nations, by which nations have bound themselves toward each other, and toward their citizens to be governed. The narrow, arbitrary doctrine cannot prevail, that this government will enforce justice under international law from a nation, but refuse it to one of its citizens before a court established by it with unlimited jurisdiction. We seek justice and relief under the law binding nations towards their citizens—that great *public law* which is recognized by nations, and whose compacts are binding as well between the citizen and the government as between nations themselves.

I now proceed, may it please your honors, to the second point of the argument.

The position assumed by the government is, that it having used its exertions, and proceeded by a course which, in its opinion, was deemed the most politic to obtain redress for the claimants, and having *failed*, it is released from all further obligation, and cannot be made responsible for that course of policy which it thought proper to adopt.

On this position, we are ruled under the strict injunctions of an arbitrary court of law, encircled by its tangled web of narrow and rigid decisions, by statutory enactments and official opinions, to show upon what authorities we assert the liability of the government. On the other hand, we are required to show wherein lies the political obligation and responsibility of the government, and to consider of its effect upon the treaty-making power.

The power of the government and its obligations towards its citizens, under the organic law and their political rights, must be first briefly referred to.

The power of the government, in all its branches, is derived from the States, as delegated by them under the Constitution, and all powers not so delegated are reserved to the States or the people. The government, in consideration of the powers thus delegated to it, assumed the obligation to protect the citizen in life, liberty and property, and all the rights with which a citizen can become invested under the government. It has no sovereign power. On the contrary, the executive frequently cannot act without the consent of the legislative department; and on some occasions, such as its exercise of the veto power, it is overruled and made subservient to the legislative.

To support this position, I will read a few extracts from a speech delivered lately before the House of Representatives, by that able statesman and jurist, General Quitman, on the powers of the federal government with regard to the Territories.

And I must here be permitted to say, that this speech has, by common consent, been universally admitted to be one of the clearest and most lucid exemplifications of the powers of the federal government ever delivered. In speaking of the sovereign power of Russia and England, he says, at page 11, of the printed speech :

“ In the nations to which I have alluded, this high controlling power is so prominent as to be readily seen and fixed. In our system, the elaborate work of a more enlightened age of the world, and a more advanced stage of the human intellect, it is not so easy to trace clearly the location of the sovereign power. It exists; but where? Does it

rest in the federal government? Let us apply the test of the definition I have given. Has the federal government power over all other powers? Not at all, sir. It is strictly limited; circumscribed by the most rigid limitations; forbidden by its organic law, over which it has no control, from exercising many of the most important attributes of sovereignty. It can exercise no sovereign powers by its own intrinsic force. It is merely a part of the machinery of government, through which, as through an agency, some of the powers belonging to sovereignty are put in operation.

"Do the State GOVERNMENTS possess this high sovereign power? A mere glance at their structure shows that they do not. The State governments are the creatures of the State constitutions. They may be enlarged, restricted, modified, and even annihilated by the organic law. They are, therefore, subject to a higher power, and are not supreme or sovereign. As in the case of the federal government, they are merely the agents through which the sovereign power is exercised, and have not that high attribute of themselves. We must look further to find the deep sources of political authority. The origin, formation, and history of our system of government, as well as the frame-work of it, show clearly where this high power exists. It reposes in the sovereign States of this great confederacy—not in the State governments, but in the States."

Again, at pages 12 and 13, he says:

"In the articles of confederation, entered into shortly after the conclusion of the revolutionary war, at the time when men, north and south, understood the structure of our government certainly as well as they do now, this language is used:

"Each State retains its sovereignty, freedom, and independence, and every power, jurisdiction and right, which is not by these articles of confederation, delegated to the United States in Congress assembled."

"*Each State retains its sovereignty, freedom, and independence.*" There was a separate sovereignty, a separate freedom, and a separate independence. Neither of these was delegated. Some powers, jurisdiction and rights were alone for the time delegated, subject to be resumed by the sovereign."

"The first article of the treaty of peace with Great Britain, signed at Paris on the 30th November, 1782, uses these significant terms:

"Art. 1. His Britannic Majesty acknowledges the said United States, viz: New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, to be free, sovereign, and independent STATES; that he treats with them as such; and for himself, his heirs, and successors, relinquishes all claims to the government, propriety, and territorial rights of the same, and every part thereof."

"And so, Mr. Speaker, you may pursue the historic record of the formation of our political organism, and look in vain for any act by which that high power, which must exist in every political community, has been ceded from its original possessors—the States. The Constitution of the United States was acceded to by the States, as States. Each for itself, in its sovereign capacity, entered into the compact. We find in it the delegation of some of the powers of government, but no cessions of sovereign power. That rested originally with the States; and there, I contend, it remains to-day. If it does not rest

with the States, where is it? I have shown that this government, being possessed only of limited powers, for specified purposes, cannot be sovereign. That high power, I repeat, remains where it originally rested—in the States of this Union; and whenever it is called into action, it must flow from its pristine source.”

And again, he says, at page 16: “The Constitution is the work of the States, and they must construe it for themselves upon all questions affecting their rights. These would cease to be rights, if subject to the antagonistic power against which they were limited. It is absurd to suppose that the States, in the formation of the Constitution, jealous of their great essential political rights, would have left them at the mercy of that very power, against the encroachments of which they were erecting a barrier. It is yet more absurd to suppose that they would have left them, by construction, to one department of the government, and that department, both from its mode of appointment and its tenure of office, the least responsible to the people.”

This has become the generally recognized doctrine of the most astute statesmen of all political parties in this country, and in it General Quitman is sustained by that pre-eminent writer on political ethics, Francis Lieber.—(Part 1, p. 273.) He says: “Government is that institution or contrivance through which the State, that is, jural society, acts in all cases in which it does not act by direct operation of its sovereignty, as mentioned above; or, in other words, government is the aggregate of authorities, with all that is directly controlled by them. It derives its power from the sovereign power of the State, that is, I repeat it, from the necessity of the existence of society. Governments have been frequently changed; dynasties which wielded the supreme (not sovereign) power have been supplanted by others, or by republican governments. Now, has the displaced government ever taken with it the sovereign power, that is, has the nation or State left behind become incapable of providing in every way for itself from its own self-sufficient or sovereign power? If the sovereign power rests in some one or something else than the State, then we have in the latter case two sovereign powers, which is absurd.”

But it will not be contended that the executive has, in any sense, or under any grant in the Constitution, sovereign power over the rights of the citizen. Those rights, guarantied and secured to him by the Constitution, cannot be sacrificed, except by incurring a responsibility under the obligations imposed on the government to protect and indemnify him. This principle is incorporated in the bill of rights of nearly every State constitution in the Union. The government has no sovereign power or control over the rights or property of the citizen, except it be exercised for the general welfare, and then it becomes responsible to him.

Lord Landsdown, in December, 1788, when the regency question was under discussion, said:

“The people, my lords, have rights. Kings and princes have none. The people want neither charters nor precedents to prove their rights; for they are born with every man in every country, and exist in all countries alike, though in some they may have been lost. I wish, therefore, that the question of *right* to exercise the royal authority,

which has been claimed and asserted, may be decided, in order that those who suffer oppression under governments the most despotic may be taught their rights as men. They will then learn that though their rights are not, like ours, secured by precedents and charters, yet as soon as they assert their rights they must be acknowledged."

This power of sovereignty neither exists in the executive branch nor treaty-making power of the government; neither in the legislative nor the judiciary; and it cannot be said to extend to either, in the unlimited sense contended for by the solicitor, and under the obsolete doctrine that "the king can do no wrong." Lieber says, at p. 299, part 1, that—

"The king can do no wrong, the king is the fountain of honor, are precisely in the same sense true and not true, as the preceding maxim, that the king never dies; that is, they are fictions or metaphoric expressions, and therefore incapable of sustaining any argument to be deduced from them, but merely expressing an idea already established, and only so far as established. Blackstone distinctly claims the same inability of doing wrong for each branch of the legislature, (i, 244.) They are, then, no peculiar attributes of sovereignty, using the term as applying to the person called, by the English law, sovereign. Besides, we know that the king, even constitutionally, can do wrong, and can be declared to have done so, as was the case in the bill of rights respecting James II; that there is a 'superiority of the laws above the king,' (Blackstone iv, 440;) that the British law 'confirms the doctrine of resistance, when the executive magistrate endeavors to subvert the constitution.'"

Again, at page 301, he says:

"No one shall obey the king personally and individually, but only politically, surrounded by the law. Whether the maxim, the king can do no wrong, with responsible ministers, be a well contrived expedient, is another question. I consider it as one of the choicest productions in the course of constitutional history; but, at the same time, I say, with Essex: 'What! cannot princes err? Cannot subjects receive wrong? Is an earthly power of authority infinite? Let them (who mean to make their profit of princes) acknowledge an infinite absoluteness on earth that do not believe in an absolute infiniteness in Heaven.'"

Now, if it please the Court, let us see how far the government has asserted its political obligation to protect the citizen under its national responsibility.

In the case of Martin Koszta, who claimed the protection of the United States, having been seized in the neutral port of Smyrna, by the Austrian authorities, Captain Ingraham demanded him, and extended the protection of our flag. For this, Austria demanded satisfaction proportionate to the outrage.

Koszta was not even an American citizen, but he had renounced his allegiance to Austria, and declared his intention of becoming a citizen of the United States.

What was the action of this government in that case? It stretched forth its might and power, and assumed a responsibility and a liability never before asserted.

It commended, approved of, applauded, and rewarded the act of Captain Ingraham, though he had gone upon the very verge of war in demanding Koszta, and it took the responsibility of his act. Nay, sirs, it did more, it took a higher ground still; it approved, with England and France, of the course of Turkey in a similar case against Austria. Mr. Marcy, in his letter to Mr. Hulseman, (Ex. Doc., 1st sess. 33d Cong., vol. 1, pp. 34 and 35,) states the case.

Here it will be seen that humanity and justice triumphed over even the obligations of a treaty and its stipulations; and it was held that the duty to protect a political offender in neutral territory was paramount to treaty stipulations.

The obligation of the government to protect its citizens and their property is fully set forth by Mr. Marcy at p. 42, *ibid.* :

"This right to protect persons having a domicile, though not native born or naturalized citizens, rests on the firm foundation of justice, and the claim to be protected is earned by considerations which the protecting power is not at liberty to disregard. Such domiciled citizen pays the same price for his protection as native born or naturalized citizens pay for theirs. He is under the bonds of allegiance to the country of his residence, and if he breaks them, incurs the same penalties; he owes the same obedience to the civil laws, and must discharge the duties they impose on him; his property is in the same way, and to the same extent as theirs, liable to contribute to the support of the government. In war he shares equally with them in the calamities which may befall the country; his services may be required for its defence; his life may be perilled and sacrificed in maintaining its rights and vindicating its honor. In nearly all respects his and their condition as to the duties and burdens of government are undistinguishable; and what reasons can be given why, so far at least as regards protection to person and property abroad as well as at home, his rights should not be coextensive with the rights of native born or naturalized citizens?"

By this joint decision of England, France, and the United States, in the case of Turkey, it is manifest that the neutral is bound to protect all persons who seek their shores from the hostility of any other power. The obligation of Portugal to protect the brig General Armstrong and her crew from the assault made by the British fleet is therefore indisputable. What would have been the action of this government towards Captain Ingraham, if he had permitted Koszta to be carried off in the Austrian frigate without firing into her? His name would have been stricken from the Navy Register, and he denounced as a coward. He acted under the obligation of the government to protect and sustain him. Is the obligation of the government less in this case? The two affairs are parallel. Both acted to sustain the honor of their country's flag. Suppose Ingraham had been in a private armed ship, and a conflict ensued by which he suffered the loss of his vessel, would not the high moral responsibility rest on this government to procure indemnity, or, in its failure, to make compensation? But we are told if Captain Reid had struck his flag to the English, and acted the poltroon and the coward, Portugal would then have been liable, and consequently this government

responsible. It may be asked, if Captain Reid at the time could have conferred with his government, would they have told him to strike his flag, or defend his country's honor? Yet it would seem, with the fullest admissions of the propriety of his course, they have neither had the honor nor justice to obtain for or make him compensation. I now ask the Court to review the most important action of the government in this case, and which seems not to have received that grave consideration to which it is entitled. I allude to the position taken by the government under the administration of General Taylor, in the instruction of Mr. Clayton to Mr. Hopkins. The despatch says:

"In presenting this view of the subject to the Portuguese government, as a frank avowal of a *fixed determination* on the part of the United States government, you will be most careful to represent, at the same time, the extreme anxiety of the President to avoid being forced to suspend or interrupt present diplomatic relations with Portugal; *because a recourse to that measure would, most probably, prove to be but the antecedent to reprisals.*"

This position on the part of the government was followed up to the very last. The final instructions of the government to Mr. James B. Clay reiterates its positive determination never to consent to arbitrate this claim. Mr. Clayton says:

"In regard to a reference of our claims to an arbiter, which has been indicated, the President has directed me to say that *no such course will, under the circumstances, receive his sanction, and this for reasons too obvious to need enumeration.*"

After Mr. Clay left Lisbon in the national ship-of-war sent to receive him, and when all diplomatic relations were suspended, this fixed determination on the part of our government was re-echoed again and again to Mr. Figanière, the Portugal minister at Washington.

Here was a responsibility assumed and asserted as boldly as in the Koszta case. The determination of the government to resort to reprisals, as indicated in the letter to Mr. Hopkins, if Portugal did not pay us, is self-evident. That position had been taken, and the act was in the course of execution when the President died. Congress alone had the power to control the decision of the executive—the succeeding administration had no right to usurp the authority of reversing that decision.

It must be distinctly understood, and kept clearly in view, that the government, by the course it had taken, was defending and maintaining, for itself, its national honor and respect, although our rights were incidentally involved. It could not withdraw from this position without suffering a degradation and humiliation which the people nor Congress would ever have consented to submit. The solicitor has been called on, in vain, for authorities to show the power or right of the succeeding administration to reverse this action and decision of the government.

A question here presents itself for the profound consideration of the Court.

Had the then Executive lived, would Congress have recommended reprisals, or would the case have been submitted to arbitration?



Would Congress have permitted this government to sink into meanness, and lose its self-respect, or would it have maintained the Executive in preserving the bright escutcheon of its asserted honor? Was not the obligation here voluntarily assumed by the Executive, as great at least to procure justice for us, as it was in the Koszta case, and was not its responsibility a thousand times greater?

We have the positive assurance, guarantied to us by the unanimous reports of the Senate and House Committees on Foreign Affairs, that had this case been submitted to Congress by the Executive, it would never have agreed to arbitrate this claim. The committee of the House say:

"The committee are of opinion that, under the circumstances, the claimants had a right to consider the repeated recognition by the different administrations of this government of the justice of their claim, and the determined action upon it by General Taylor, as carrying with it the force of a judgment in their favor, which a succeeding administration had no power to review and unsettle.

"In the cases of Pottinger and Spence, (reported in the *Opinions of the Attorneys General of the United States*, vol. 1, p. 486,) the question arose, under John Quincy Adams' administration, how far the then Executive was 'authorized to review and unsettle the acts of its predecessor.' Mr. William Wirt, Attorney General of the United States, (October, 1825,) held that, 'If it has such authority, the Executive which is to follow us must have the like authority to review and unsettle our decisions, and to set up against those of our predecessors; and upon this principle, no question can be considered as finally settled.' 'Hence I have understood it to be a rule of action, prescribed to itself by each administration, to consider the acts of its predecessors conclusive, as far as the Executive is concerned. It is but a decent degree of respect for each administration to entertain of its predecessor to suppose it as well qualified as itself to execute the laws according to the intention of their makers, and not to set an example of review and reversal, which, in its turn, may be brought to bear upon itself, and thus keep the acts of the Executive perpetually unsettled and afloat. In conversing with President Adams on this subject, I understood him to concur in the general rule of considering all acts of the preceding administration as final; and, although partial injuries may now and then remain unredressed by the operation of this, in common with all other general rules, yet it is better to bear that partial evil, or leave it to legislative redress, than to introduce the more extensive and incalculable evils which must result from considering all the past acts of the past executives as open to reconsideration and readjudication at the pleasure of the individuals who were interested in them. And if a decision made in regard to these gentlemen eight years ago, during the Presidency of Mr. Monroe, is open to review and reversal, I do not see upon what principle of discrimination we can refuse to review and reverse a decision made during the Presidency of Mr. Washington,' &c., &c.

"Congress, under the Constitution of the United States, alone has power, in a large number of cases, to redress a gross and manifest injury done to a citizen. In England, in similar cases, the subject is

permitted to institute suit against his government before the ordinary tribunals of justice. In a late case of the kind, (*De Bode vs. Regina*), where a British subject claimed to be entitled to compensation for certain losses suffered by him through confiscation of his property in the first French revolution, which had been the subject of a convention between England and France, (reported in 16th Eng. Com. Law and Equity Reports, p. 23,) the Lord High Chancellor used the following language: 'It is admitted law, that if the subject of a country is spoliated by a foreign government, he is entitled to obtain redress from the foreign government through the means of his own government; but if, from weakness, timidity, or any other cause, on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country.'

"The only ground on which the validity of this claim can be questioned is entirely technical in its character, and not to be enforced against the evident demands of justice. It is not a point of law that is to be decided, but a principle of national honor that is to be vindicated.

"The gallant sailors who were attacked in the neutral port of Fayal doubted not that they would be protected in their just rights by the full power of their government; and having had repeatedly, since, the approval of their conduct by the authorities of their country, your committee are of opinion that a stronger case for redress in equity could scarcely be made out, and therefore report the accompanying bill, and recommend its passage."

This committee of the House was composed of the late distinguished Judge Bayly, of Virginia; Judge Harris, of Alabama, celebrated as a jurist; Mr. J. R. Chandler, of Pennsylvania; Mr. Ingersoll, of Connecticut, a distinguished lawyer; Mr. Taylor, of New York; that able statesman and jurist, Mr. Clingman, of North Carolina; Governor Shannon, of Ohio; William Preston, of Kentucky, a lawyer of distinguished ability, and Judge Perkins, of Louisiana, whose reputation as a national law jurist is well known. These gentlemen, representing nine of the largest and most influential sovereign States in the Union, whose combined delegations would carry by a majority any measure before the House, ratified this decision.

This committee fully endorsed and concurred in the report of the Senate committee, composed of Judge Mason, of Virginia; Judge Douglas, of Illinois; Mr. Slidell, of Louisiana; Judge Clayton, of Delaware; Colonel Weller, of California; and Mr. Norris, of New Hampshire. The Senate committee say: "Under all the peculiar circumstances of the case, the committee are of opinion that the claimants are justly entitled to relief on strict legal principles; and even were their convictions on the subject less decided than they are, they would find in the heroic conduct of Captain Reid and his gallant crew strong inducements to give them the *benefit of their doubts*."

"There are two points of general interest involved in this matter, which should not be without their influence on the action of the Senate. The effect to be produced on our own citizens by according indemnity in stimulating them to emulate the noble example of Captain Reid; for there can be no doubt that if he had suffered himself to be captured

*without resistance, full pecuniary satisfaction would long since have been accorded by Portugal to the claimants. Shall we refuse it because he has added to our naval history one of its most brilliant pages? Again: If we act upon the avowed principle that our citizens are always to be compensated for any injuries they may suffer from the violation by belligerents of the law of nations, other countries will be more earnest in maintaining the inviolability of their territory."*

Now let it be remembered by the Court, that this unanimous report of the Senate committee was made after the closest investigation of the case, and in the face of the letter of Mr. Secretary Marcy to Judge Mason, construing the letters of the claimants into acquiescence to the arbitration.

Here we have the unanimous and solemn decision of the committees of both Houses of Congress, staking their reputations as judges and jurists, and publicly avowing to the world that we are justly entitled to relief on strict legal principles.

The opinion of Attorney General Wirt, and the decision of the committee of the House of Representatives—"that the claimants had a right to consider the repeated recognition, by the different administration of this government, of the justice of their claim, and the determined action upon it, as carrying with it the force of a judgment in their favor, which a succeeding administration had no power to review and unsettle"—is entitled to the most solemn consideration of this Court: for, as Leiber says, (part 1, pp. 265, 267,) "public opinion is public law:" and he remarks, it was not without a deep meaning that, with reference to the late interesting libel case of *Stockdale vs. Hansard*, the printer to the House of Commons, some British papers, (journals,) in June, 1837, in giving Lord Denman's decision against the printers for having published, under the direction of the House, certain documents containing slander, headed the article "*The Law versus The House of Commons.*" And if it be true that this Court has no power to examine into the wrongs committed by the Executive towards our citizens, as contended by the Solicitor, by what authority does he claim the right of this Court to run counter, and sit in judgment on the acts of the committees of the Senate and House of Representatives.

Now, let us take a glance at the position of our government before this claim was referred to arbitration. Mr. Clay—in the presence of the American fleet, then lying in the Tagus, having obeyed the will of the Executive, and refused to accept the *bonus* offered by Portugal to refer this claim to arbitration—had left the country. All diplomatic intercourse was suspended. The case was preparing to be submitted to Congress. The claimants were daily expecting that their claim would be paid finally by Portugal, or that Congress would order reprisals. General Taylor died, refusing, to the last moment of his life, to submit this claim to arbitration. On the accession of the new administration, Mr. Clayton, on leaving the Department of State, informed his successor of the position of our foreign relations, and explained to him the attitude of our government towards Portugal, and that the papers were preparing to be submitted to Congress.

Mr. Clayton's testimony to the sequel of this transaction is as follows:—(See report of this case, p. 48 and 49.)

"Well, sir, at this crisis, when all the other claims were about to be paid—and I verily believe this was also about to be paid—the President died. *Within three days* after my successor went into office, he agreed to refer the claim to the Prince Louis Napoleon. I know that, because ~~he~~ called upon me, and, in the course of the conversation, notified me that he had made that arrangement with Mr. Figanière, the Portuguese minister. \* \* \* I thought the circumstances of the case so clear against that government, and her conduct so atrocious, that there ought to be no reference of a claim which was so clearly right."

Again, he said: "In this case, the claim was referred to the arbitration, without the consent and without the knowledge of the claimant. He had not the slightest information that such a thing was in progress." "*Within three days* after the matter came into the hands of my successor in the office of Secretary of State, he agreed to refer it. I know this of my own knowledge. At that very moment, the claimant was confidently expecting that this claim would be paid. Other claims had been given up, and he had every reason to suppose that this also would be paid."

The new Executive, then, previous to consenting to refer this case, was in the full possession of the fact, that the American flag had been sent to the shores of Portugal, unfolding a demand over which the escutcheon of the national honor of this republic was pending; and because the government had refused the corrupting offer as the price of its degradation, it was bidden defiance.

This new administration, with the full knowledge of these facts, proceed of its own accord—without our knowledge or consent, and against the known express and declared will of the previous Executive, that he would never consent to arbitrate this claim—and within *three days* after its formation, agreed upon this diplomatic marriage treaty.

"Oh! most wicked speed, to post  
With such dexterity to *meretricious* sheets!"

The history of this submission, and the manner under which it was conducted under the treaty and protocol, is familiar to this Court. What a ridiculous farce, then, it becomes, to assert that we *acquiesced* in this arbitration, when the Executive knew well that it was acting in direct conflict with, and in opposition to, the declared will and injunction of its predecessor? But to charge us with having consented to a submission which had been agreed upon almost a month previous to the letter written in answer to the inquiry made to ascertain the fact, and requesting the government to take no step that would compromise our rights, needs no reply.

But I contend that the letter of the Hon. Secretary Marcy to the Hon. Mr. Mason, chairman of the Committee on Foreign Relations, lays down the true doctrine of the liability of the government in this case. He says:

"I cannot countenance the principle that, where this government is called on by a citizen of the United States to interpose for the pur-

pose of recovering claims against any other government, *proceeds in good faith for that purpose*, and fails in its object, or obtains what may be regarded as an inadequate indemnity, it places itself in a situation to be called on to pay the claims, or to satisfy the expectations of the claimants. Our government is but an agent in such cases; *and unless it acts against the express or known wishes of those who have invoked its interposition*, it does not, as I conceive, incur any liability whatever to the claimants."

And now, I ask, were the proceedings had, in submitting this claim to arbitration, in accordance with *good faith for that purpose*? Were they not in violation of the *good faith* of the nation pledged not to arbitrate this claim? They most certainly were. And did it not "*act against the express and known wishes of those who had invoked its interposition*, by informing them that their objections and suggestions were too late, and afterwards by concluding and ratifying a treaty which had been agreed upon before that interposition could, by any possibility, have been invoked?"

This submission was not only contrary to the express will of the claimants, but that of the decision and determination of the previous Executive. It is in vain to escape from this conclusion; and the liability of the government on this ground alone is clear and indisputable under the original obligation of the government to the citizen, as well as by the doctrine asserted and recognized by Secretary Marcy.

I now desire to direct the attention of the honorable Court to the position taken by the learned Solicitor and in that of the dissenting opinion of this Court.

It is contended on the part of the Solicitor that the government cannot be made liable for the acts of its agents or officers in the conduct of public affairs; and he cites an opinion of the law officer of this government to affect this claim. The opinion of the Attorney General is entitled to no greater weight than that of any other distinguished lawyer; it is but the spinning of a thread from out the solitary brain of an individual. But while I do not wholly concede the correctness of the opinion, I deny its applicability to this case.

The dissenting opinion of the Court maintains the same doctrine.—(See report of this case, p. 220.)

On this point also, and in this connexion, the Solicitor has cited two authorities (6 Peters, pp. 729, 730, and 14 Peters, p. 458,) to show that the action of the Executive is conclusive, and that this Court has no power to review it. We have always admitted that, so far as the treaty obligations between Portugal and the United States are concerned, *the matter is conclusive*, but not between this government and its citizens. The authorities cited do not affect this case in the least, because the liability of the government does not attach, and we do not assert it on the ground of the United States having made the treaty, but from the consequences growing out of this treaty, precluding our rights against Portugal.

Can it be said, on the one hand, that the action of the government, under the administration of General Taylor, *was not* decisive and binding on its successor, while, on the other hand, that the action had under the administration of Mr. Fillmore is final and conclusive

against the citizen, and that though it be admitted erroneous, no responsibility attaches because of the act of an irresponsible agent?

The question then arises whether the act of the Department of State was, or was not, the act of the Executive—or whether the act of submission by the Secretary of State was his sole individual act, as an officer or agent of the government, separate and distinct from, and wholly unconnected with the executive, and on whom no responsibility can rest for the act of his *Secretary*? The treaty making power is vested in the Executive and the Senate. Kent fully defines the powers of the President in 6 ed. vol. 1, p. 284 to 288.

It is clear that the *public secretary* of the President has no power to submit the claims of our citizens to arbitration, or to negotiate a treaty. But, on the contrary, the President *alone* is declared to be the constitutional organ of communication with foreign powers, and the “efficient AGENT” in the conclusion of treaties. Agent of whom? Agent of the government, or the agent of the people? That people who created him, and delegated to him, under the Constitution, those subscribed and limited powers, in which can be found no *authority* or *sovereignty* over the rights of the people!

Kent declares, in defining the powers of the Executive, that the *President* is bound to see that the laws are faithfully executed, and that he is generally charged with the POWERS AND RESPONSIBILITY of the EXECUTIVE DEPARTMENT! And, furthermore, that, for exceeding the precise and definite limitations imposed upon the exercise of his power, the Constitution has rendered him responsible *by law* for mal-administration. Responsible not only, I contend, to be impeached, but responsible through the government, directly to the people, who shall suffer by his mal-administration.

It is incontrovertible and manifest that the Secretary of State can only act by and under the instructions and authorization of the President. The Department of State is only a branch of the Executive. It is a component part of the executive government. The Secretary of State stands in no position *as agent*, either to the government or the people. His office is simply ministerial, because he is only acting under a superior authority. His position is widely different, and entirely distinct from that of a mere official agent of the government, such as a marshal or collector. The distinction is this: An official agent of the government is simply entrusted to perform and carry out those duties and functions relating to the internal regulations of the government, being in no manner connected with the executive power, further than the performance of duties imposed on such officer by positive law.

In all the domestic and foreign communications made to the President, the Executive answers through the public secretary of the government. In all these official acts and communications the secretary invariably uses the language, “I am directed by the President to say,” &c. Will it be asserted by this Court that Mr. Clayton acted simply as the agent of the government, without the authority and direction of the President? With what truth, then, can it be maintained that Mr. Webster was not the instrument of the Executive, but acted in-

dependently, as a mere agent, without attaching any responsibility on that Executive?

If the position taken by the Solicitor, and, in the dissenting opinion of this Court, be correct, that the Secretary of State is only the agent of the government, and that the government is not responsible for his act, then it must inevitably follow, as an incontestible conclusion, that the treaty which was made is without force or effect, and the claimants cannot be concluded by it.

It is in vain, sirs, to shift the responsibility of the government in trying to sever its political connexion by such distinctions, admitting of no difference.

Why, sirs, what a chameleon thing—what a miserable shadow becomes this government if such a doctrine is to prevail.

Mr. Secretary Marcy gives an apt illustration of this changing positions, and sleight-of-hand hocus-pocus of governments, in his celebrated Koszta letter, (see p. 37 ;) he says:

“By the consent and procurement of the Emperor of Austria, Koszta had been sent into perpetual banishment. The Emperor was a party to the expulsion of the Hungarian refugees from Turkey. The sovereign, by such an act, deprives his subjects to whom it is applied of all their rights under his government. He places them where he cannot, if he would, afford them protection. By such an act he releases the subjects thus banished from the bond of allegiance. Any other result would make the political connexion between the subject and the sovereign a state of unmitigated vassalage, in which *all the duties and no rights would be on one side, and all the rights and no duties would be on the other.*”

This is the precise position now assumed by the Solicitor in this case. He claims for the government all the power and no duties or obligations, on the one hand, while he denies the citizen all his rights, and claims from him all the duties on the other. This would indeed be unmitigated vassalage!

Are we, then, to be stripped of our immunities, as American citizens, by this assumed imperial sovereignty, which, while it usurps the power to sacrifice our rights, denies its responsibility? Are we, Koszta-like, to be banished from the protection of our country, and told that it is neither under any obligation to enforce our rights, nor under any responsibility to indemnify us? Why, sirs, even under this tyrannical, despotic government of Austria, a more enlarged spirit of justice and equity prevails. It is reported that the tribunals of Austria have held that an humble shoemaker might bring his action against the Emperor on a common contract!

Let us suppose for a moment, in the Koszta case, at the time he was held in custody by the French consul at Smyrna, awaiting the final action of this government, that President Pierce had died, and the succeeding administration abandoned and reversed the position and action of Mr. Marcy, what would have been the public opinion? It certainly would have condemned the *right* of the Executive so to do, while the *power* to act could be denied.

Sirs, this is the only case to be found on record, in the whole history of our government, in which a succeeding administration had imper-

illed the national honor by receding from the position of a previous administration, assumed upon unequivocal and undoubted testimony of the legality and justice of the claim it had pledged the national honor to assert.

Now, I ask the learned Solicitor, was it the act of the Executive, or that of the Department of State, that assumed the responsibility in the Koszta case, and was not that act beyond the right of interference by any other administration?

I submit to your honors if it be not clearly shown that the Executive, in this case, in referring it to arbitration, acted against the express and known wishes of the claimants, which had been signified to the previous Executive. The succeeding administration was informed of and knew this fact. It acted in secret, and on its own responsibility; without reference either to the previous action of the government, or consulting with the claimants to *ascertain* their wishes. It took the responsibility of reversing the position of this case, and the settled and final decision of the past Executive, which we contend it had not the right to do. It was bound to have sent the case to Congress for its legislative decision. But as it did not do so, and having taken the responsibility to arbitrate the claim and failed, the failure to procure indemnity carries with it the force of an obligation to recompense the claimants.

The dissenting opinion of the Court maintains the sovereign capacity of the Executive, and quotes Mr. Adams to show that it was proper to compromise this claim.—(See the Report, p. 223.)

As a general principle, I do not deny the doctrine of Mr. Adams, provided the negotiation is properly conducted. The political obligation which rests upon the government is that it shall, in all its transactions, see that the solemn forms of the law are fully and completely executed and gone through, with a due regard to the claimants' rights; while, on the other hand, in its negotiation with another nation, it must see that the forms, equally solemn and imperious, shall be strictly complied with. Can it be said that, in negotiating the treaty with Portugal, this organic rule, "that the Executive shall see that the solemn forms of the law are fully complied with, and executed with a due regard to the claimants' rights," *was strictly observed?*"

If the Executive had strictly complied with this rule, he would have carried out the solemn decision of his predecessor. For it is admitted in the learned dissenting opinion, that where the government asserts to interfere for the citizen, its action may be even by reprisals.

There is no room for doubt but that *was* the evident intended resort, by General Taylor, if Portugal had not complied with the demand. And I feel to-day morally certain, if the action of General Taylor had been carried out and the case submitted to Congress, Portugal would have immediately yielded to our just rights.

The learned judge, in his dissenting opinion, seems to have forgotten the position taken by the previous administration, and has not considered the rights of the claimants in connexion with its reversal. It must be remembered, too, that in 1818 Mr. Adams reiterated this demand against Portugal, declaring its justness upon the admitted acknowledgments of the Portuguese authorities. But while the dis-



senting opinion denies that the government acts as the agent of the citizens, Mr. Marcy, Mr. Justice Story, Lieber, and our leading distinguished jurists assert the contrary.

Let us now examine the effect of this treaty on the claim in equity which we make against the government.

Can it be established that this treaty-making power—the act of the Executive, combined with the co-operation of the Senate—is sovereign, supreme, and omnipotent, having no liability or responsibility attached to it? That because of this power, delegated by the people, no wrong or injury to the citizen can be committed or result from it, and that all treaties so made by consequence shields the responsibility of the government to the citizen? If this be so, then our government is arbitrary, despotic, and tyrannical, and the Constitution by which its powers are strictly defined and limited is mere blotting paper.

In the case of the schooner *Peggy*, (1 Cranch, 103,) the Supreme Court of the United States held that individual rights, *acquired by war*, and vested rights of the citizens might be sacrificed by treaty for national purposes. And, in the case of *Ware vs. Hilton*, (3 Dallas, 199, 245.) it was said to be a clear principle of national law that private rights might be sacrificed by treaty to secure the public safety, though the government would be bound to make compensation and indemnity to the individuals whose rights had thus been surrendered. —(1 Kent, 167.) The power to alienate and the duty to make compensation are both laid down by Grotius, (b. 3, c. 20, sec. 7,) in equally explicit terms.

These authorities cannot be overthrown—the principle is clear, the law is positive. The Solicitor does not even attempt to controvert it. His whole argument is directed to create in the mind of the Court a fear and a terror of its assuming the responsibility of reviewing the action of the Executive, and of placing itself in direct conflict with the treaty making power. This position is only an imaginary one, and is wholly irrelevant to the question of the *responsibility* of the government now before the Court. This question does not involve the Court in a conflict with the power of the Executive and Senate, nor is the Court called upon to revise or reverse their action, as the Solicitor contends. The *power* of the Executive to make this treaty has never been contradicted or denied. The policy, and its *right* so to do, under the peculiar circumstances of this case, have been gravely questioned. By the *course* of this policy has arisen its liability, growing out of its duties and obligations towards the claimants. We have never assumed, in any manner, an antagonistical position in opposition to the power of the Executive to treat, or denied the binding force of the treaty *between the two nations*. On the contrary, between them, *the two treating powers*, we hold and assert that it is *res judicata*. It is simply the *effect and operation* of this treaty on the rights of the claimants, from whence arises the obligation of the government to its citizens, as declared by the Supreme Court of the United States in the cases cited in Cranch and Dallas. This position, supported by the high authorities cited, cannot be disturbed.

The confusion of theories which the Solicitor has heaped up like a fog bank in this case, needs only the calm light of reflection on the

true question before the Court to dispel it entirely. This mist of terror which he has raised for himself before the eyes of the Court, to prevent it from seeing a naked question of right, which is totally unconnected, and every way isolated from the power of the treaty making branch of the government, is perfectly transparent.

Divest the case, then, of this mock sanctity of sovereign power which the Solicitor has such a pious dread of violating, and let us see where we stand.

No exercise of power resulting in a wrong to a citizen, or the sacrifice of his rights, can be committed under the federal government without a responsibility, either to a superior authority or directly to the people. If the government has power and rights to exercise, it also has duties and obligations to perform. Those duties and obligations imply as well rights and immunities on the part of the citizen. For even Lord Landsdown has said "the people *have rights*, kings and princes have none." We are not questioning the *power* of the government, under any circumstances, to make a treaty, nor its right to sacrifice or surrender the claims of its citizens for the general welfare of the country, under the obligation to indemnify them. But the right of one administration to reverse the decision of another is a different affair. Even then it has the *power*, while the right is questionable. The power of the government is one thing—the *right* to exercise that power, without a responsibility, is another. The principle is fully recognized, and Secretary Marcy admits the government to be but an agent; and he says the government is liable where it acts against the express and known wishes of the citizen. It did so act in this case, and made a treaty, to which we have shown we were no parties in any sense. It took our rights, sacrificed and surrendered them, and bound itself to submit to the decree of an arbiter against the consent and the express and known wishes of the claimants.

We are not, then, arraigning or trying the government, nor sitting in judgment on its acts, in the sense contended by the Solicitor. We are but trying the question of the right of the citizen against the government, for a wrong and injury sustained. Can the finding of this Court on a naked question of the right of the citizen reflect in any manner upon the government? Can this pious dread of sovereignty on the part of the Solicitor and the Attorney General prevent the establishment of justice by this Court? If so, the object of the Court is defeated, and the whole enactment is a mere farce!

If the acts of the government are to be sheltered by a veil of imaginary sanctity from all scrutiny or examination by this Court—if its acts are always to pass upon the world for just, although wrong and palpably oppressive, then it is in vain that the *law of nations* have laid down rules of conduct for governments and their citizens.—(Ruth. Inst. Nat. Law, vol. 2, 598.)

No sophistry can establish this position, that, although a flagrant wrong has been done by the government to one of its citizens, *under the color of the sovereignty* of an existing authority, nor by *virtue of it*, that the injurious act becomes to all effectual purposes a lawful one, for no other reason but because it has been done.

It will not be denied but an obligation rests upon the government

to prosecute the claims of its citizens against a foreign nation. *Before it becomes answerable* under this obligation, it must examine into the rights of the citizen under the claim preferred, and determine upon the liability of the foreign government. The national liability is suspended while the subject matter is regularly *sub judice* between the foreign nation and the claimant, because it is yet undecided whether the government will adopt the injury and convert it from a private to a public one.

Having acknowledged the rights of the citizen, not only by one, but by repeated subsequent administrations, and declared the liability of the foreign government under the *law of nations*, the responsibility to procure indemnity for its citizen under this obligation becomes perfect. The asserted liability of Portugal by this government forecloses all controversy between the claimants and the captors, and terminates forever all ordinary judicial inquiry upon the matter of it. Having thus asserted that "*it would make no demand not founded in justice, and submit to no wrong*," if justice be refused by the foreign government, then the *law of nations* gives a remedy, either by solemn war or by reprisals. Having proceeded thus far, the two nations become the parties to the controversy.

Can there be any just sense of national pride or respect for national jurisdiction or prerogative fairly attributable to a just nation, which will allow it to go *thus far* in demanding a right of its citizens against a foreign nation by afterwards receding from and reversing its action, and exacting from the people of the United States a blind and superstitious faith in the righteousness and irresponsibility of such a proceeding?

Then the inquiry arises, from whence does a succeeding administration obtain the power and exclusive right to judge of and reverse the acts of its predecessor, without incurring a direct responsibility under this obligation, if it be not for the general welfare of the people; and if a treaty be made, sacrificing the rights of the claimants *for the general welfare*, does not the government become directly responsible?

In order to ascertain if this treaty, and the decision of the arbiter under it, is conclusive against the claimants, we must first inquire whether the American government, when administered under General Taylor, would have esteemed such a decree just, or whether it would not be bound, under the *law of nations*, by the repeated admissions of the rights of the claimants and the declared liability of Portugal for the sufferance of the violation of her neutrality, to have resorted to reprisals? Can a doubt arise in the mind of the Court but that the latter conclusion has been fully established?

This case must be decided wholly upon the principles of *international law*, because it is not a claim strictly against this government, but resulting from a responsibility incurred by the government in prosecuting a claim of its citizens against a foreign nation. The authorities cited on 6 Peters, 729, and 14 Peters, 458, by the Solicitor, and the only ones on which he relies are totally inapplicable in this case, because the decisions are not based on any question arising under the *law of nations*, involved before this Court; nor can the decisions of the highest tribunal of a nation be made the shield to protect its

national liability, incurred under the great public law which holds a government and its people equally responsible.

The national liability being fixed, no judicial proceedings can diminish it. For if it can, then every nation may make its own decrees to screen it from all obligations arising under the fixed and established principles of international law, which would produce the annihilation of all justice, and the science of law and government, thus driven by the winds of anarchy, would soon founder in the dark sea of chaos!

If this Court holds the decisions in *Peters* authority in this case, then the decisions in the Supreme Court of the United States on questions of *international law*, which we have cited from 1 *Cranch* and 3 *Dallas*, are in direct conflict and opposition to it, though these opinions are sustained by the supreme tribunal of the world and the authorities of the law of nations.

But what does the Court say in this opinion from 6 *Peters*? That all official actions, *within the scope of the officer's powers*, whether legislative, judicial, or executive, are conclusive of the matters, and not to be re-examined, "*unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law.*"

If this authority be applicable, then the decision makes a special reservation fully adapted to this case. *The law has provided a supervisory tribunal* by the establishment of this Court, and *prescribed the revision of cases* sent to it by either House of Congress. It has further empowered the Court, under the 9th section of the act, *after the decision of Congress*, to order a re-hearing on principles of equity, where the Court is satisfied that wrong has been done. This reservatory discretion given to the Court shows the extent of the jurisdiction intended to be conferred upon it. If it has granted this jurisdiction, it has also granted the power and confidence to assert the wrongs of its citizens and the liability of the government.

But it would be worse than folly in this case to test the liability of the government by its own laws made to govern its domestic relations with its citizens, unconnected with matters or principles relating to international law; because its liability here can only be tested under that law by which it is made answerable to other nations.

In a case before the Mexican commission, sitting at Washington under the treaty of 1839, it was held by Judge Marcy (now Secretary of State) and Judge Breckinridge, of Pennsylvania, in opposition to the Mexican commissioners, that no act of the government, whether executive, legislative, or judiciary, could stand in bar as conclusive against the just rights of an American citizen. This decision was *confirmed* by the commission of 1848, under the treaty of Guadalupe Hidalgo.

The opinions of that highly eminent and distinguished civilian, William Pinkney, delivered at the board of commissioners acting under the 7th article of the treaty of 1794, between the United States and Great Britain, cover every possible question arising upon this claim before the Court. The case of the *Betsy Furlong* master, belonging to Baltimore, is this: She was captured in 1793, during the war between England and France, on the second day out from the French island of Guadalupe. She was condemned by the vice-admi-

rality of Bermuda as lawful prize, and this decision was confirmed by the lords of the high court of admiralty, the supreme judicature in the kingdom in matters of prize. It was contended by the agent of the Crown, on the part of the British government, that this decision was conclusive against the claimants, and precluded the board from re-examining the matter.

Mr. Pinkney on this point delivered his opinion, and it is to his imperishable argument on that occasion that I am deeply indebted for the light which has so resplendently relumed upon every dark feature of this case, and for whose memory I shall ever entertain the deepest sense of gratitude.

Mr. Pinkney, in maintaining the reverse of this position, cites from Rutherford's Institutes of Natural Law, vol. 2, pp. 596, 597, and 598, and (at page 207, Wheaton's Life of Pinkney) says:

"The author I have just quoted proves incontestibly, by arguments drawn from the nature and foundation of prize cognizance, that this doctrine is absurd and inadmissible; that neither the United States nor the claimants, its citizens, are bound to take for just the sentence of the lords if in fact it is not so; and that the affirmation of an illegal condemnation, so far from legitimating the wrong done by the original seizure, and precluding the neutral from seeking reparation for it against the British nation, is peculiarly that very act which consummates the wrong and indisputably perfects the neutral's right of demanding that reparation through the medium of his own government."

The principle contended for in the case of the *Betsey* by Mr. Pinkney is precisely that here raised in the case of the General Armstrong. For it is impossible for the Court to distinguish between the liability of a government in the case of an illegal capture of a *neutral vessel* by a *belligerent* and an illegal capture, or the *destruction of a belligerent vessel* under the protection of a *neutral power*. The action of the government, in either case, perfects or destroys the national liability. Mr. Pinkney, at page 211, *ibid.*, says:

"If it grants" (or procures) "adequate redress, there is nothing to be answerable for; but if, instead of doing so, it completes the original injury by rendering it irreparable by any ordinary means, the national responsibility is obviously perfect. The injury becomes its own; and the neutral," (or citizen,) from being compelled to ask redress against the captor," (or foreigner,) "is now authorized to ask it against *his nation*, which has sheltered him against just demands."—(See Grotius, Lib. 2, ch. 21, sec. 1, 2, and 8; 2 Ruth. Inst. Nat. Law, p. 515.)

Again, at page 212, he says:

"But there is no law, nor can a shadow of authority be produced to prove that there is, which prescribes to States *implicit submission* to them when well grounded complaints are made against them. On the contrary, it is, under such circumstances, the duty of the State whose citizens are oppressed to seek reparation for the damages produced by them."

And further, at page 213, he asks:

"How is the want of right to pass a decree by which a neutral has

been injured to be established, if that very decree is admitted to prove undeniably that the right existed? How is oppression to be shown or redressed, if that which constitutes its essence, and gives to it its character and quality, is precisely that which legitimates and shields it from investigation? A final, unjust judgment against a neutral, says the law of nations, is a good ground for reprisals, because no other mode is left."

Again, at page 223, he says:

"According to that law, as I have shown above, an illegal sentence by the lords, confirmatory of an illegal capture to the prejudice of a neutral, is a national wrong, for which the British government is to make amends. In every correct idea of the subject, the act of the court is the act of the nation."

At page 225, his argument is irresistible. He says:

"It is inconceivable, that while the British nation is answerable for wrongs produced by the acts of its constitutional legislature, even after they have received the sanction of admiralty degrees, the acts of its prize courts, having no warrant in any law whatsoever, can be lifted above the reach of inquiry or exception. And here it is proper to notice a suggestion, which we have heard more than once deliberately repeated, that it is highly improbable that Great Britain would consent that the degrees of its highest court of prize should be brought into question. Without stating the particular manner in which this improbability has been inferred, it may be sufficient to observe that, if the suggestion is grounded upon any supposed right on the part of Great Britain to insist on the conclusive nature of such degrees, we have already seen that, however such a right may be supposed, it does not in truth exist. If it be rested on any other ground, it may be answered, that Great Britain has consented to submit the justice of one of its highest acts of sovereignty (an act of parliament) to our determination; and has also consented to subject to our opinion the propriety of a rule of prize cognizance necessarily flowing from, or rather included in, an order of his Majesty in council, and adopted in practice by the lords!"

In conclusion, at page 227, Mr. Pinkney says:

"It is in this view that I have supposed it to be important to ascertain by a preliminary inquiry, that neither the United States, nor the claimants, their citizens, were bound to receive as just the sentences of the lords, unless they were so in fact; that such sentences, if unjust, instead of shaking off the responsibility of the British nation for the losses and damages resulting from illegal captures and condemnations, produced the perfection of that responsibility, and gave to the United States an indisputable right, by the law of nations, to require of the British government, in behalf of its citizens, adequate compensation for those losses and damages."

This opinion of Mr. Pinkney was fully confirmed by the British commissioners, and I refer the Court to the whole opinion, which by changing the names of the parties, is nothing more nor less than the present case before this Court.

In another case, that of *The Sally*, Hayes, master, on the power of

the board to entertain a certain class of cases, Mr. Pinkney, at page 353, *ibid*, said:

"The case of the *Betsey*, Furlong, gives me authority now to say, that this implicit confidence in the maritime tribunals of Great Britain (whatever titles they may have to the respect of neutral nations) is so far from distinguishing the seventh article of the treaty, that even after a decision by the highest prize court in the country against the claimant, we are authorized to entertain his claim, inquire into the merits of it, and grant compensation against the British government, if, by the law of nations, as applied to the case, we shall think it right so to do."

It has been indisputably shown that this Court has been equally empowered by the act creating it, to entertain this claim and inquire into the merits of it, precisely in the same manner if it was sitting as commissioners under a treaty.

If, then, the decree of a prize court, the highest and most authoritative known to the law, is not conclusive, in cases arising under the public law of nations, so as to fix forever the rights of individuals involved in such a decision; but, on the contrary, if a commission, established between two nations to ascertain the rights of their citizens as affected by the conduct of either during the existence of a war, has the power to go behind such decision, and ascertain and adjudicate these claims as though no such decree had ever been made; then, how can it be maintained that the action of one department of a government, in the exercise of its treaty-making power, is authoritative and binding so as to take away private rights, acknowledged repeatedly, and in the most solemn forms, to be just, both by the State bound to enforce, and the one bound to award compensation? For it will be readily admitted that the executive department, in such a case, is clothed with no such ample powers to investigate; nor is it controlled by any such rigid rules of right as a court of justice; but, on the contrary, it has full and ample power, for the general welfare, to yield up demands the most equitable and just, and to gloss over with the deceptive coloring of diplomatic sophistry a breach even of the national honor, but not without incurring a responsibility.

And shall it be said that this treaty, thus loosely negotiated, without observing a strict regard for the rights of the claimants; which withheld the most important evidence to sustain our cause; which debarred us from representing our rights, and, with no decree upon the matter submitted, shields the government from the responsibility it assumed towards the claimants?

When the award was found to be imperfect and unjust, and that it did not decide upon the matter submitted, it should have been rejected on the protest of the claimants, as was the case of the northeastern boundary question, submitted to the King of the Netherlands, under General Jackson. The government, in the plenitude of its power, did not think proper to do so. Having accepted of the reward, in face of our protest, it became responsible for its omissions of duty, under its political obligations as well as legal, towards its citizens. Can such a treaty stand between the claimants and justice, and rob them of their rights?

This has, indeed, been a painful task to me. After the decision of this case by the Court, and its promulgation to the world; after it had decided upon the law, and ordered testimony to be taken, and the starving, beggarly claimants, tottering over the grave, gave up and expended almost their last cent to defray the expenses of procuring testimony to prove their claims, under the impression and belief that the speedy justice of this Court would recompense them for the wrongs of half a century, I have been enforced by their anxious inquiries to divulge to them that this Court still doubted on their rights to justice! Oh, sirs, it had been better that all these victims had long ago suffered death together in the battle they fought to sustain the honor of their country's flag, than thus to have been tortured and racked by their government, in so often holding out vain hopes, ending at last, in eternity, without justice.

If the attitude which the government now assumes towards these claimants is to be sustained by this Court, then it has no right to the glory reflected by their achievements upon the national prowess.

If ample, though tardy justice is not now to be awarded, then should everything which tells of the national ingratitude be blotted out forever. It would be a fit appropriation of a portion of the public treasure, the approaches to which, by honest claimants, is beset with so many formidable barriers, to employ some vandal hand to make a bonfire of every record that tells of their sufferings and their wrongs; to tear from our nation's history that brilliant page, at the recital of which so many breasts have been made to heave with patriotic emotions; to blur and deface from the walls of your Capitol one of the most touching and beautiful tributes which genius, under the guidance of patriotism, has ever been made to pay to heroic deeds.\*

Whilst the blood and treasure freely and voluntarily lavished near half a century ago remains unrequitted, the swelling tide of patriotism in the future, called forth by those vicissitudes to which men and States are alike subjected, should not be made to turn back in coldness and darkness upon the popular heart, by such striking and melancholly monuments of the national ingratitude, and the national dishonor!

**THE OWNERS, &C., OF THE BRIG GEN. ARMSTRONG *vs.* THE UNITED STATES.**

Opinion delivered by Judge BLACKFORD:

This is a claim against the United States for one hundred and thirty-one thousand six hundred dollars. The claim is presented by Samuel C. Reid, on behalf of himself and of the owners, officers, and crew of the American privateer General Armstrong.

This privateer, on the 26th and 27th days of September, 1814, during the last war between the United States and Great Britain, was destroyed by certain British ships of war in a harbor of the island of Fayal. The kingdom of Portugal, to which Fayal belonged, was, at

\* Allusion is here made to the fresco painting of the battle of the brig General Armstrong in the room of the Committee on Naval Affairs, in the new wing of the Capitol.



the time, a neutral nation ; and, consequently, the combat of the belligerents, in which the privateer was destroyed, was a violation of the laws of nations. The commencement of this conflict was between the privateer and a boat or boats of the British ships, in which first encounter there were a few persons killed and some wounded. But the governor of the island knew nothing of these first acts of hostility until after they had occurred. As soon as he was informed of their occurrence, he used every exertion in his power, by peaceable measures, to prevent any further hostile acts by the British, but without success. He did not, to be sure, resort to force ; and it is evident, that owing to the want of means, he could not, by force, have prevented the disaster which ensued.

On said 27th of September, 1814, Samuel C. Reid, the captain of the privateer, entered his written protest, in which he charged the British vessels with being the aggressors. This protest is sworn to by the captain, the first and third lieutenants, the sailing master, surgeon, captain of marines, and four prize masters of the brig. There are also, as to the aggression, the statements of the American consul and of the governor of Fayal. On the other hand, a lieutenant of the British navy, and commander of a barge, engaged in the conflict, together with the master and one of the seamen of the barge, made oath, on said 27th of September, 1814, before the British consul at Fayal, showing, if their statements be true, the privateer to have been the aggressor.

On the 19th of December, 1814, Jenkins & Havens, as agents of those concerned in the privateer, requested the government of the United States to demand of Portugal compensation for the damage sustained by the loss of the vessel.

It appears by a letter of the Portuguese minister of the 22d of December, 1814, that the Prince Regent of Portugal, upon information of the governor of Fayal, had directed his minister in London to require of the British government "satisfaction and indemnification, not only for his subjects, but for the American privateer, whose security was guaranteed by the safeguard of a neutral port."

On the day after the date of that letter, the Portuguese minister enclosed to Mr. Sumter, the American minister at Rio Janeiro, a copy of the advices received from the governor of Fayal respecting the destruction of the privateer, with a communication saying : "His Royal Highness, however, flatters himself that the citizens of the United States will not have reason to complain of the Portuguese governor in that conflict, having used his utmost power to prevent the evil that occurred." The British government refused the indemnification demanded by Portugal for the loss of the privateer, alleging, according to Count Tojal, that the conduct of Commodore Lloyd was fully justified as a mere act of retaliation, provoked by the hostilities previously commenced by Captain Reid.

On the 3d of January, 1815, Mr. Monroe, Secretary of State, instructed Mr. Sumter, the American minister aforesaid, "to bring all the circumstances of the transaction distinctly to the view of the Portuguese government, and to state the claim which the injured party had to immediate indemnification." In December following,

Mr. Sumter wrote to Mr. Monroe as follows: "I have not had the good fortune to receive any letter from your department of a later date than that of the 3d of January last, which related solely to the reclamation to be made in favor of the General Armstrong privateer, destroyed by the British at Fayal. You will have seen by my note of the first of January, that I had already attended to that affair. Others of a similar kind have been represented since. The only answer I have yet obtained is, that inquiry has been ordered in the other cases; and that a demand of satisfaction had been made in the case of the Armstrong." In 1818, Mr. Adams, Secretary of State, wrote to the Portuguese minister relative to the claim, concluding his note as follows: "It is hoped your government will, without further delay, grant to the sufferers by that transaction, the full indemnity to which they are, by the laws of nations, entitled." In 1837, Mr. Kavanagh, our chargé d'affaires at Lisbon, in compliance with his instructions, demanded of Portugal satisfaction for said injury.

In 1841, Captain Reid, as agent aforesaid, wrote to Mr. Webster, Secretary of State, informing him that the President had been applied to "concerning their claims upon the Portuguese government, for the entire loss of that vessel," and urging Mr. Webster to assist the claimants. Mr. Webster accordingly, in January, 1842, instructed Mr. Barrow, our chargé d'affaires at Lisbon, to present the claim to the minister of foreign affairs, which instruction was complied with in May, 1842. The Portuguese minister, in 1813, refused the demand, alleging that the privateer was the aggressor, and that the Portuguese authorities had used every means in their power to prevent the deed. In 1844, the Secretary of State, Mr. Upshur, wrote to Samuel C. Reid, jr., as follows:

"DEPARTMENT OF STATE,  
"Washington, January 10, 1844.

"SIR: At the repeated instance of yourself and others, interested in the case of the privateer General Armstrong, this government has again and again instructed its representatives at Lisbon to bring the claim to the notice of the government of Portugal. This has been done, and every argument has been employed to induce Portugal to acknowledge the justice of the claim, and to make due reparation. All these efforts, of which you are well aware, have proved unavailing, and the Department of State is unwilling, under all the circumstances, to renew the application, having every reason to believe that all future applications will prove as fruitless as those that are past. Argument and importunity have been exhausted, and this government can see nothing in the circumstance to justify or warrant it in having recourse to any other weapons.

"I am, sir, your obedient servant,

"A. P. UPSHUR.

"SAMUEL C. REID, Jr., Esq., *New Orleans.*"

The gentlemen, however, to whom the above letter was addressed, endeavored, by his subsequent letters, to persuade our government to continue the negotiation with Portugal. But Mr. Calhoun, the suc-

cessor of Mr. Upshur in the State Department, took the same view of the subject with Mr. Upshur. In a letter to Mr. Johnson, of Louisiana, Mr. Calhoun says: "The case of the General Armstrong was disposed of by my predecessor upon grounds which appear to me to be judicious and proper. Of this Mr. Reid has been duly informed; and I can see no good reason, under the circumstances, for renewing the claim, or for continuing a correspondence on the subject."

In 1849 this claim against Portugal was renewed at Lisbon, in pursuance of instructions from Mr. Clayton, Secretary of State, but without success. In April, 1850, on the demand being again made by our government, Portugal offered to refer the matter to arbitration, mentioning the King of Sweden as the arbitrator. The offer was rejected. In July, 1850, another proposition to refer the case to arbitration was made by Portugal. This last proposition was, on the 5th of September of the same year, accepted by Mr. Webster, then Secretary of State. A treaty was accordingly, on the 26th of February, 1851, entered into between the two governments, by which the said claim against Portugal was submitted to the arbitrament of some sovereign, potentate, or chief, of some nation in amity with both the high contracting parties.

The President of the French republic, Louis Napoleon, was afterwards selected as the arbiter, and he consented to discharge the duty. On the 11th of December, 1852, the arbiter caused to be delivered, at Paris, to the respective ministers of the United States and Portugal, his award in favor of Portugal, as follows:

*Translation of the award of President Napoleon, in the case of the  
"General Armstrong."*

"We, Louis Napoleon, President of the French republic:

"The government of the United States, and that of her Majesty the Queen of Portugal and of the Algarves, having by the terms of a convention signed at Washington on the 26th of February, 1851, asked us to pronounce as arbiter upon a claim relative to the American privateer 'General Armstrong,' which was destroyed in the port of Fayal, on the 27th of September, 1814; after having caused ourself to be correctly and circumstantially informed in regard to the facts which have been the cause of the difference, and after having maturely examined the documents duly signed in the name of the two parties, which have been submitted to our inspection by the representatives of both powers, considering that it is clear, in fact, that the United States were at war with her Britannic Majesty, and her Most Faithful Majesty preserving her neutrality, the American brig, the 'General Armstrong,' commanded by Captain Reid, legally provided with letters of marque, and armed for privateering purposes, having sailed from the port of New York, did, on the 26th of September, 1814, cast anchor in the port of Fayal, one of the Azores islands, constituting part of her Most Faithful Majesty's dominions;

"That it is equally clear that, on the evening of the same day, an English squadron, commanded by Commodore Lloyd, entered the same port;

“That it is no less certain that during the following night, regardless of the rights of sovereignty and neutrality of her Most Faithful Majesty, a bloody encounter took place between the Americans and the English ; and that on the following day, the 27th of September, one of the vessels belonging to the English squadron came to range herself near the American privateer for the purpose of cannonading her ; that this demonstration, accompanied by the act, determined Captain Reid, followed by his crew, to abandon his vessel, and to destroy her ;

“ Considering that if it be clear that, on the night of the 26th of September, some English long boats, commanded by Lieutenant Robert Fausset, of the British navy, approached the American brig, the ‘General Armstrong,’ it is not certain that the men who manned the boats aforesaid were provided with arms and ammunition ;

“ That it is evident, in fact, from the documents which have been exhibited, that the aforesaid long boats having approached the American brig, the crew of the latter after having hailed them and summoned them to be off, immediately fired upon them, and that some men were killed on board the English boats, and others wounded—some of whom mortally—without any attempt having been made on the part of the crew of the boats to repel at once force by force ;

“ Considering that the report of the governor of Fayal proves that the American captain did not apply to the Portuguese government for protection until blood had already been shed, and, when the fire had ceased, the brig ‘General Armstrong’ came to anchor under the castle at a distance of a stone throw ; that said governor states, that it was only then that he was informed of what was passing in the port ; that he did, on several occasions, interpose with Commodore Lloyd, with a view of obtaining a cessation of hostilities, and to complain of the violation of a neutral territory ;

“ That he effectually prevented some American sailors who were on land from embarking on board the American brig for the purpose of prolonging a conflict which was contrary to the law of nations ;

“ That the weakness of the garrison of the island, and the constant dismantling of the forts, by the removal of the guns which guarded them, rendered all armed intervention on his part impossible ;

“ Considering, in this state of things, that Captain Reid, not having applied from the beginning for the intervention of the neutral sovereign, and having had recourse to arms, in order to repel an unjust aggression of which he pretended to be the object, has thus failed to respect the neutrality of the territory of the foreign sovereign, and released that sovereign of the obligation in which he was to afford him protection by any other means than that of a pacific intervention ;

“ From which it follows that the government of her most faithful Majesty cannot be held responsible for the results of the collision which took place in contempt of her rights of sovereignty, in violation of the neutrality of her territory, and without the local officers or lieutenants having been required in proper time, and enabled to grant aid and protection to those having a right to the same ;

“ Therefore, we have decided, and we declare, that the claim presented by the government of the United States against her Most

Faithful Majesty has no foundation, and that no indemnity is due by Portugal, in consequence of the loss of the American brig, the 'General Armstrong,' armed for privateering purposes.

"Done and signed by duplicate, under the seal of State, at the palace of the Tuileries, on the 30th day of the month of November, in the year of grace one thousand eight hundred and fifty-two.

[L. S.]

"L. NAPOLEON."

The whole correspondence between the American and Portuguese governments respecting this claim, together with other papers in the case, are printed, and will accompany this opinion.

The question to be decided is, whether, under the circumstances of the case, the United States are liable to the claimants for the loss occasioned by the destruction of the privateer?

The claimants contend that they once had a valid claim against Portugal for one hundred and thirty-one thousand six hundred dollars; that they have lost that claim by the mismanagement of the same by the United States; and that the United States are therefore bound, by law, to pay them the amount so lost.

The first inquiry to be made is relative to the nature of the demand of the claimants against Portugal.

There is no absolute certainty, from the evidence, as to whether the privateer or the British vessels were the aggressors. The first gun was fired by the privateer, but that firing may have been justifiable in self-defence. Whether it was so or not, is a question upon which there is contradictory evidence. On the part of Portugal, we have the deposition of Lieutenant Fausset, of the British navy, and two of his men, dated the 27th of September, 1814, which, according to a copy furnished by the Portuguese minister, is as follows: "That on Monday, the 26th instant, about eight o'clock in the evening, he was ordered to go in the pinnace or guard-boat, *unarmed*, on board her Majesty's brig *Carnation*, to know what armed vessel was at anchor in the bay, when Captain Bentham, of said brig, ordered him to inquire of said vessel, (which, by information, was said to be a privateer.) When said boat came near the privateer, they hailed to say the Americans, and desired the English boat to keep off, or they would fire into her; upon which Mr. Fausset ordered his men to back astern, and with a boat-hook was in the act of so doing, when the Americans, in the most wanton manner, fired into said English boat, killed two and wounded seven, some of them mortally, and this notwithstanding said Fausset frequently called out not to murder them; they they atruck and called for quarters. Said Fausset solemnly declared that no resistance of any kind was made, nor could they do it, not having any arms, nor, of course, sent to attack said vessel. Also, several Portuguese boats, at the time of said unprecedented attack, were going ashore, which, it seems, were said to be armed."

On the part of the privateer, we have the protest of Captain Reid and his officers before stated, made and sworn to on said 27th of September, 1814. That protest, after mentioning the privateer's arrival at Fayal, soon after noon of the previous day, says: "That during the said afternoon his crew were employed in taking on board water,

when about sunset of the same day the British brig of war *Carnation*, Captain Bentham, appeared suddenly doubling round the northeast point of this port. She was immediately followed by the British ship *Rota*, of thirty-eight guns, Captain P. Somerville, and the seventy-four gun ship, *Plantagenet*, Captain Robert Lloyd, which latter, it is understood, commanded the squadron. They all anchored about seven o'clock p. m., and soon after some suspicious movements on their part, indicating an intention to violate the neutrality of the port, induced Captain Reid to order his brig to be warped in shore, close under the guns of the castle; that, in the act of doing so, four boats approached his vessel filled with armed men. Captain Reid repeatedly hailed them, and warned them to keep off; which they disregarding, he ordered his men to fire on them, which was done, and killed and wounded several men. The boats returned the fire, and killed one man and wounded the first lieutenant; they then fled to their ships and prepared for a second and more formidable attack. The American brig, in the mean time, was placed within half cable's length of the shore, and within half pistol shot of the castle. Soon after midnight, twelve, or, as some state, fourteen boats, supposed to contain nearly four hundred men, with small cannon, swivels, blunderbusses, and other arms, made a violent attack on said brig, when a severe conflict ensued, which lasted near forty minutes, and terminated in the total defeat and partial destruction of the boats, with an immense slaughter on the part of the British. The loss of the Americans in the action was, one lieutenant and one seamen killed, and two lieutenants and five seamen wounded. At daybreak, the brig *Carnation* was brought close in, and began a heavy cannonade on the American brig, when Captain Reid, finding further resistance unavailing, abandoned the vessel, after partially destroying her, and soon after the British set her on fire."

The American consul at Fayal, in his note of September 26, 1814, to the governor of the Azores, says: "In violation of the neutrality which his royal highness, the Prince Regent, has promised to observe towards the United States of America, and England, in the present war, the ships of war of his Britannic Majesty, now lying in this port, lately ordered four or five armed boats to surprise and carry off the American armed schooner *General Armstrong*, which is lying here under the guns of the castle, on the protection of which she regarded herself absolutely in security. The boats were repulsed, but a new and more formidable attack is now feared," &c. A relation of the conflict, similar to that given in Captain Reid's protest, is given by the governor of the Azores, but as he was not present at the commencement, he could only speak from information as to that part of it. The Portuguese minister, then at Rio Janeiro, considered, from information received from the said governor, that the British were the aggressors, and in his letter on the subject to the British minister in December, 1814, he denounced the conduct of the British commander in very strong terms.

It appears to me, from an examination of the evidence of those persons having any personal knowledge of the affair, which evidence is contradictory, and none of which is impeached, that the question of

fact in controversy as to whether the privateer or the British ships were the aggressors, was a fair one for negotiation between the United States and Portugal, and to be referred, if they could not agree, to some proper tribunal for adjudication.

There is another inquiry relative to the demand of the claimants against Portugal, and that is, whether, supposing the British vessels to have been the aggressors, the laws of nations rendered Portugal liable for the loss of the privateer?

Had the privateer, instead of being destroyed, been captured only by the British, and had afterwards come into the possession of Portugal, there is no doubt but that Portugal would have been bound to restore the vessel to the original owners; nor is there any doubt but that the governor of Fayal, if he had had the power, would have been bound to endeavor, by force, to prevent the disaster. But the difficulty as to these matters is, that the privateer having been destroyed could not be restored, and that the governor had no means by which he could have prevented, by force, the destruction of the privateer. The above stated question, therefore, whether, supposing the British to have been the aggressors, Portugal was liable, by the laws of nations, to pay for the privateer, is not entirely free from doubt. And the cause of the doubt is, that the privateer was never in the possession of Portugal, and there was no neglect of duty by the governor of Fayal. Chancellor Kent, in one part of his commentaries, says: "It is not lawful to make neutral territory the scene of hostility, or to attack an enemy while within it; and if the enemy be attacked, or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution."—(1 Kent's Com., 117.) But on a subsequent page his language is as follows: "A neutral has no right to inquire into the validity of a capture, except in cases in which the rights of neutral jurisdiction were violated; and in such cases the neutral power will restore the property, if found in the hands of the offender, and within its jurisdiction, regardless of any sentence of condemnation by a court of a belligerent captor. It belongs solely to the neutral government to raise the objection to a capture and title, founded on the violation of neutral rights. The adverse belligerent has no right to complain when the prize is duly libelled before a competent court. If any complaint is to be made on the part of the captured, it must be by his government to the neutral government, for a fraudulent, or unworthy, or unnecessary submission to a violation of its territory; and such submission will naturally provoke retaliation."—(1 Kent's Com., 121.) If this last cited passage from Kent be the law, Portugal was not liable, because it is certain that the governor of Fayal did not submit to the outrage fraudulently, or unworthily, or unnecessarily. But, on the contrary, he endeavored, as soon as he had notice of the hostile acts, to prevent, by peaceable means, the further violation of the neutrality of the port; and he had no other means by which it could be prevented. Wheaton's language is as follows: "Where a capture of enemy's property is made within neutral territory, or by armaments unlawfully fitted out within the same, it is the right as well as the duty of the neutral state, where the property thus taken comes into its possession, to re-

store it to the original owners."—(Wheaton's International Law, 494.) This doctrine of Wheaton agrees with that laid down by Kent in the passage last above cited from his Commentaries. Kent there says, that in cases in which the rights of neutral jurisdiction are violated, "the neutral power will restore the property if found in the hands of the offender and within its jurisdiction." This doctrine of these eminent American authors is decidedly in favor of Portugal; for if her liability depended on her having possession of the privateer, she certainly was not liable, the vessel having been destroyed by the British ships.

The question respecting the liability of Portugal, under the circumstances of the case, does not appear to be settled by foreign writers on the laws of nations. Bynkershoek may be considered to be against the Portuguese side of the question.—(Bynkershoek on the Law of War, 59, 60.) But Kluber, who is a much later writer, is in favor of Portugal. This last named author says, "that the neutral is not to allow, voluntarily, that either of the belligerent parties shall commit, upon its neutral territory, either continental or maritime, any hostile acts."—(Kluber's Law of Nations, page 86, section 284.) Portugal was not accountable for the outrage, according to the authority of Kluber, because it is clear that the governor of Fayal did not allow, *voluntarily*, the breach of the neutrality of the port. This doctrine of Kluber is substantially the same with that of Kent last referred to; the latter author saying, that the complaint against the neutral government must be for "a fraudulent, or unworthy, or unnecessary submission to a violation of its territory." That there was no such submission in this case is shown by the correspondence between the governor and the British commander during the night of the 26th of September aforesaid. Indeed, Captain Reid's protest confines his complaint to the *inability of Portugal*. That protest says: "And the said Captain Reid also protests against the government of Portugal for their inability to protect and defend the neutrality of this their port and harbor."

It appears to me, therefore, that the question of public law involved in the present case, as well as the question of fact before referred to, was a very proper subject to be submitted by the governments of the United States and Portugal to arbitration.

The questions mentioned above were exceedingly important. Not only a large amount of money depended upon the result, but, what is of infinitely higher concern, the honor of two independent nations was involved in the controversy. Those questions, both of fact and of law, had been the subjects of negotiation for more than thirty years previously to 1851, when the treaty between the two governments was entered into submitting the controversy to arbitration, which resulted in an award, by the President of the French republic, against the validity of the claim.

In consequence of that award, the claimants have abandoned their claim against Portugal; but they now turn round and demand the amount, namely, one hundred and thirty-one thousand six hundred dollars, against the United States. The ground of this demand is, that the Secretaries of State, and the President and Senate of the



United States, have lost, by mismanagement, the claim against Portugal, and have thus made their own government liable for the amount. There are several charges of mismanagement insisted on which will be particularly noticed.

One of the charges, which is that of neglect in the negotiation, admits of a short answer. The delay which occurred, from the time the claim was presented soon after it originated, till 1837, is accounted for by the disordered state of the government of Portugal during that period. The Secretary of State, Mr. McLean, in 1834, gives the unsettled political affairs of Portugal as a reason for not then insisting on the claim. The claimants, in their argument, made part of their memorial to Congress in 1854, say: "These delays were occasioned, as will appear by the correspondence, by the peculiar condition of the government of Portugal, and the indisposition of the American government to urge this claim on her, until that government should be placed in a better situation, and under better auspices; but the owners have never failed to make continual claim," &c. The American chargé d'affaires at Lisbon, gives to the Portuguese minister, in 1850, the following reason for the non-presentation of the claim between 1815 and 1837, namely: "The disinclination of the government of the United States to urge the claim upon Portugal, convulsed, as she almost continually was, by intestine difficulties."

Another charge of mismanagement of the claim relates to the submission to arbitration.

The claimants say that our government received a *bonus* from Portugal as a consideration for referring the case. This objection must depend upon the face of the treaty. That was made, on the part of our government, by the President and Senate. It was by the treaty alone that the case was referred. The treaty commences as follows: "The United States of America and her Most Faithful Majesty, the Queen of Portugal and of the Algarves, equally animated with the desire to maintain the relations of harmony and amity which have always existed, and which it is desirable to preserve between the two powers, having agreed to terminate, by a convention, the pending questions between their respective governments, in relation to certain pecuniary claims of American citizens, presented by the government of the United States against the government of Portugal, have appointed as their plenipotentiaries for that purpose," &c. The first article is as follows: "Her Most Faithful Majesty the Queen of Portugal and of the Algarves, appreciating the difficulty of the two governments agreeing upon the subject of said claims, from the difference of opinion entertained by them respectively, which difficulty might hazard the continuance of the good understanding now prevailing between them, and resolved to maintain the same unimpaired, has assented to pay to the government of the United States a sum equivalent to the indemnities claimed for several American citizens, (with the exception of that mentioned in the fourth article,) and which sum the government of the United States undertakes to receive in full satisfaction of said claims, except as aforesaid, and to distribute the same among the claimants." The second and third articles merely provide for the submission to arbitration of the case of the

orig General Armstrong. The fourth article is as follows: "The pecuniary indemnities which her Most Faithful Majesty promises to pay, or cause to be paid, for all the claims presented previous to the 5th day of July, 1850, in behalf of Americaa citizens, by the government of the United States, (with the exception of that of the General Armstrong,) are fixed at ninety-one thousand seven hundred and twenty-seven dollars, in accordance with the correspondence between the two governments." The other articles have no bearing on the question. There is surely nothing in this treaty to support, in the slightest degree, the idea that the submission of the case, by the President and Senate, was in consideration of a *bonus*, or for any other purpose than that of having the claim properly and legally investigated and determined. The treaty provides for the payment of all the claims except that of the General Armstrong, and refers that claim to arbitration; and that is the whole of the treaty as regards the submission. It is unnecessary surely to notice any further this extraordinary charge against the treaty-making power of the United States.

Another charge is, that our government had no authority to submit the case to arbitration without consulting the claimants. This position is untenable. When the government, at the request of the claimants, consented to make a demand on Portugal for the alleged claim, the controversy became one between government and government, which might, if the governments chose, be referred to arbitration. The law of nations on this subject is stated by Mr. Wildman to be as follows:

"The only pacific modes of settling differences which cannot be adjusted by negotiation are arbitration and reprisal. First, with respect to arbitration: An arbitrator is a person authorized by the parties in difference to decide what shall be done with regard to the matters submitted to his judgment. Where the award of an arbitrator is final, and confined to the terms of the submission, it is conclusive, unless it has been made in collusion with one of the parties.—(Puffendorf, book 5, chap 13; Vattel, book 2, sec. 329.) For there is no superior authority by which the validity of such an award can be examined, and consequently it is binding, although it be unjust.—(Grotius, book 3, chap. 20, sec. 46; Puffendorf, *ibid.*" 1 Wildman's International Law, p. 186, chap. 5.)

It is certain, therefore, that the submission to arbitration of the controversy relative to the claim against Portugal was in strict accordance with the laws of nations. The idea that the government was not authorized to refer the case to a third power without consulting the claimants is not well founded. The correct view of this matter is, that as soon as our government was induced by the claimants to interfere, the controversy became an affair of state, to be treated of between the two governments as other differences between nations are treated; that is to say, by negotiation, arbitration, and such other modes as are recognized by the laws of nations. But, further, it appears that the claimants acquiesced in the reference. The present Secretary of State, Mr. Marcy, in his letter of 1854 to the chairman of Foreign Relations, says: "From an examination of the files of

the department, it appears that, pending the negotiations which terminated in the convention with Portugal of 1851, two letters were addressed to the Secretary of State on the subject of the reference of the Armstrong claim to the arbitration of a third power; one dated August 26, 1850, by S. C. Reid, 'late commander of the privateer General Armstrong,' and the other dated September 5, 1850, by S. C. Reid, jr., 'sole and only authorized agent of the claimants in the case.' Copies of these letters, and of the replies thereto, are herewith enclosed. There are several other letters from the last named gentleman on the same subject, and of subsequent dates, among the files of the department, from which it would appear that the claimants in the case had acquiesced in the decision of their government to agree to refer their claim to arbitrament. If a different opinion was entertained by them, it is at least certain that their authorized agent did not, in any letters to this department, protest against that decision, or intimate doubts as to its propriety or expediency." Those statements of the Secretary seem to be, at all events, a full answer to this charge.

Another charge of mismanagement is the refusal of the Secretary of State, Mr. Webster, to forward to the arbiter a written argument of the claimants.

The treaty between the two governments, by which the case was referred, contains the following article:

"ART. 3. So soon as the consent of the sovereign, potentate, or chief of some friendly nation, who shall be chosen by the two high contracting parties, shall have been obtained to act as arbiter in the aforesaid case of the privateer brig General Armstrong, copies of all correspondence which has passed in reference to said claim between the two governments and their respective representatives shall be laid before the arbiter, to whose decision the two high contracting parties hereby bind themselves to submit."

It appears to me that this language of the treaty shows that the arbiter was to determine the case upon the correspondence which had taken place on the subject between the two governments. That correspondence had been very extensive, and had been conducted with great ability on both sides. The questions of fact and of law belonging to the case had been fully investigated by the gentlemen to whom the business was confided. It would seem to have been proper, under those circumstances, for the parties to submit the cause to the arbiter, upon the correspondence, without further argument by either of them. It is proper also to add, that if, as the claimants contend, Mr. Webster's refusal to forward the argument was improper, he was guilty of a wrong to the claimants. Now the law is settled, that for any such wrong by a public officer the government is not liable to the individual injured. The language of Judge Story on this subject is as follows: "In the next place, as to the liability of public agents for torts or wrongs done in the course of their agency, it is plain that the government itself is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the subordinate officers or agents employed in the public service; for it does not undertake to guarantee to any persons the fidelity of any of the officers or

agents whom it employs, since that would involve it, in all its operations, in endless embarrassments, and difficulties, and losses, which would be subversive of the public interests; and, indeed, laches are never imputable to the government."—(Story on Agency, section 319.)

To place this charge in its true light, I must borrow the argument of an eminent statesman. Mr. Webster, in his refusal to forward the argument, was either right or wrong. If Mr. Webster was right, there is an end of the charge. If Mr. Webster was wrong, then there is an end of the charge also; because the government is not liable for the wrong of a public officer in his action respecting a private claim. So that whether Mr. Webster was right or wrong, there is no ground for the charge.

The claimants make one more charge of mismanagement of their claim, namely, that the award should have been rejected as not being within the terms of the submission.

The claimants say that the arbiter has decided on the facts of the case, when he was only authorized to decide a question of law. The second article of the treaty referring to the case is as follows:

"The high contracting parties not being able to come to an agreement upon the question of public law involved in the case of the American privateer brig General Armstrong, destroyed by British vessels in the waters of the island of Fayal, in September, 1814, her Most Faithful Majesty has proposed, and the United States of America have consented, that the claim presented by the American government in behalf of the captain, officers, and crew of the said privateer, should be submitted to the arbitrament of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties." The third article (herein before copied) contains the following provision: "Copies of all correspondence which has passed, in reference to said claim, between the two governments and their respective representatives, shall be laid before the arbiter, to whose decision the two high contracting parties hereby bind themselves to submit." The second article commences by saying, that the parties disagreed respecting the question of public law; but when the article comes to state the agreement to submit, it says, that her Most Faithful Majesty has proposed, and the United States of America have consented, that the claim presented by the American government in behalf, &c., should be submitted to the arbitrament, &c.; and the third article, in order to enable the arbiter to determine the merits of the claim, directs that copies of all the correspondence, in reference to the claim, should be laid before him. It seems, therefore, to be very clear that the merits of the claim, that is, both the facts and the law, were submitted to the arbiter, and were to be decided by him.

The consequence is, that the award, which is in favor of Portugal, upon the facts of the case and the law applicable to them as they were understood by the arbiter, must be considered to be within the submission, and to have been rightly accepted by the government.

I have now examined all the charges made by the claimants against the United States as to the management of the claim, and have come to the conclusion that none of them are sustainable.

But there is another and more enlarged view of this case, which it

is proper to notice. This view is presented by the following letters of instruction from Mr. Forsyth, as Secretary of State, to Mr. Kavanagh, our chargé d'affaires at Lisbon, in regard to the present claim :

“ DEPARTMENT OF STATE,

“ *Washington, October 22, 1835.*

“SIR: In a despatch addressed to you on the 20th of May last, (No. 4,) your attention was called to a claim of the owners, officers, and crew of the American privateer General Armstrong, which was captured and destroyed by a British fleet in the port of Fayal during the last war between the United States and Great Britain; and you were informed that Captain Reid, who presented himself to be the agent of the parties concerned, would be requested to transmit to you the necessary documents to establish the claim, and to show the amount of damages to which the persons interested were entitled. Permission having been granted to Captain Reid to forward those documents through the department, the enclosed papers have just been received from him, and are transmitted to you without examination. The department is not to be understood, therefore, as expressing any opinion in respect to their sufficiency for the purpose for which they are designed, or as the amount of the claim which you are to make upon the Portuguese government. It is not thought necessary to add anything to the instructions which have heretofore been given you upon the subject.

“I am, sir, your obedient servant,

“ JOHN FORSYTH.”

[Extract.]

“ DEPARTMENT OF STATE,

“ *Washington, September 21, 1836.*

“SIR: \* \* \* \* \*

“It is not necessary that you should wait for any further opinion of the department upon the claim of the owners, officers, and crew of the privateer General Armstrong. You have already been instructed as to the general character of this claim, and the principle upon which it is founded. You will make the best use of such testimony as has been furnished you by the claimants in its support; and as it is well understood that, after asking the interference of their government to procure redress for the injuries they suppose themselves to have sustained, the parties must abide by such settlement as that government may make, you will, after a careful examination of the evidence, demand from the Portuguese authorities the highest amount of damages which, in your judgment, a prudent and conscientious man would feel himself justified in asking, were he prosecuting his own claim. \* \*

“I am, sir, your obedient servant,

“ JOHN FORSYTH.”

The doctrine of this last letter of Mr. Forsyth is similar to that stated by Mr. Adams, as Secretary of State, in 1823. The following is Mr. Adams' language: “But unacknowledged, unsettled, unliquidated claims form the natural subject of negotiation, and of all

negotiation the necessary and essential character is compromise. Of such claims, whether originating in contract or in wrong, the very application of an individual to one government to assist him in the enforcement of his claim upon another, imports, of itself, the consciousness that he cannot obtain his claim without that assistance, and makes them at once a subject of negotiation and compromise.”—(House Rep. 1 vol., 1st sess. 33d Congress.)

I consider when, at the request of a person presenting a claim on a foreign nation, our government assents to interfere in his behalf, its action may be by negotiation, compromise, arbitration, or even by reprisals or war. But in the adoption of any such measure, the government, by the understanding of the parties, and by the laws of nations, exercises its own judgment and discretion. The claim thus in the possession of the government becomes a national one, to be attended to as other claims of the nation are attended to. The government on such occasions acts, not as an agent of the claimant, but in its sovereign capacity, and with a view not merely to the individual interest of the claimant, but to the general welfare of the nation. It frequently happens where a number of citizens of one nation have claims on another nation, and solicit the interference of their own government, that a treaty is entered into between the two nations, by which the claims are discharged on the payment of a certain sum to be distributed among the claimants. If that sum prove insufficient, the claimants must bear the loss. The case is one of compromise, and the claimants must abide by it.—(See the communication of Mr. Adams above referred to.) The judgment and discretion of our government in the present case were exercised by the President and Senate in referring, by a treaty with Portugal, the claim in question to the arbitrament of the President of the French republic, and by the executive department in its negotiations with the Portuguese authorities before and after the submission. This exercise of judgment and discretion by the treaty-making power, and by the executive department, was political in its nature, and is entirely independent of the judiciary. The result was an award of the arbiter, upon the merits, in favor of Portugal. The award must be considered final and conclusive. Grotius, as to the effect of such an award, says: “Although the civil law may decide upon the conduct of such arbitrators, to whom a compromise is referred, so as to allow an appeal from their decision, or complaints against their injustice; this can never take place between kings and nations. For here there is no superior power that can either rivet or relax the bonds of an engagement. The decree, therefore, of such arbiter must be final and without appeal.”—(Grotius, book 3, ch. 20.)

I have very little more to say in regard to this suit. I have shown that it was upon the repeated solicitation of the claimants, that our government caused the claim to be presented to the Portuguese government; that the facts and the law on which the claim was founded were disputed by Portugal; that there was an able correspondence on the subject during several years between the two governments; that the case was far from being a clear one, either as to the facts or the law, for either of the parties; that the parties not being able to agree, referred, by treaty, the matters in dispute to arbitration; that the

evidence and the law were placed before the arbiter in conformity to the terms of the treaty, and that an award was rendered by the arbiter in favor of Portugal. The reason, no doubt, of the claimants' application to our government for assistance was, that they had no hope, by their own efforts, to obtain anything from Portugal. The assistance applied for was given in the mode which our government thought most advisable, and which was in accordance with the laws of nations. The failure of the cause before the arbiter was because the claim did not appear to him to be well founded. I know of no ground, under those circumstances, upon which the United States can be held liable for the claim in a court of justice governed as this Court is by legal principles. The bravery of the officers and crew of the privateer in the conflict at Fayal cannot be too highly admired. For their valor on that occasion, they received from Congress, in 1834, an appropriation, as prize money, of ten thousand dollars. For any further compensation to which the present claimants may believe themselves entitled, they must rely, in my opinion, not upon any legal right, but upon the liberality of Congress.

I am therefore of opinion that the claimants have no cause of action.

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IN THE COURT OF CLAIMS.

SAMUEL C. REID, in behalf of himself and the owners, officers, and crew of the United States private armed brig General Armstrong, vs. THE UNITED STATES.

SCARBURGH, J.—The petitioner states the following case :

On the 26th and 27th of September, A. D. 1814, the United States private armed brig General Armstrong, commanded by Samuel C. Reid, belonging to the port of New York, was destroyed by a large British fleet in the neutral port of Fayal, in the dominions of Portugal, in violation of the laws of nations. The government of Portugal, immediately after the transaction, admitted her liability to this government, and called upon England for an apology and indemnification, which were unhesitatingly accorded.

The United States government, from the inception of this claim to the present day, has ever acknowledged the rights of the claimants as legal and just. Under the administration of General Taylor a fleet was sent to Portugal, and a peremptory demand made for this claim. Afterwards the government of the United States made a treaty with Portugal, whereby she compromised the rights of the claimants, and for a *bonus* agreed to refer the "Armstrong claim" to arbitration. Louis Napoleon, the umpire, decided adversely to the claimants, and contrary to the law and evidence and the facts in the case, and in violation of his oath as President of the republic of France, the decision having been rendered by the "Emperor of France."

The treaty and agreement made with Portugal to arbitrate this claim was made without the knowledge, consent, or advice of the claimants, or their agent. The government of the United States never protested against the award as being illegal, unjust, and con-

trary to the articles of the treaty in this case made with Portugal, although she was fully aware of the same.

The government of the United States, in making the treaty with Portugal, without the knowledge, advice, or consent of the claimants, assumed the responsibility and undertook and promised to pay the claimants their justly recognized demand against Portugal, to wit: the sum of one hundred and thirty-one thousand and six hundred dollars, being the amount recognized by this government and demanded of Portugal.

The claim was presented to the Congress of the United States on the 19th day of January, A. D. 1854, and referred to the Committee on Foreign Relations in the Senate. On the 10th day of March, A. D. 1854, the committee reported in favor of the claimants. On the 26th day of January, A. D. 1855, the bill was ordered to be engrossed for a third reading, by a vote of ayes 22, nays 17. On the 16th day of February, A. D. 1855, this vote was reconsidered, and the bill ordered to lie upon the table, by a vote of ayes 24, nays 23.

The claim having also been presented to the House of Representatives, the Committee on Foreign Affairs, to whom it was referred, reported in favor of the claimants on the 29th day of May, A. D. 1854. The bill for the relief of the claimants failed to be acted upon by the House of Representatives for the want of time, and was, by a resolution of that body, transferred to this Court.

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This, it will be observed, was originally a claim against Portugal. It is now presented as a claim against the United States. It may have been a just claim against the former, but it may, nevertheless, be without foundation as a claim against the latter. It is as a claim against the United States that it must now be considered.

As a claim against Portugal it was confided to the government of the United States for prosecution. That it was the duty of this government to prosecute it there can be no doubt; but upon what principles this duty rests it is not material, at this point, to consider. The government accepted the trust, and acted upon it; and it may be assumed that it did so in pursuance of the obligations which it owed to the claimants. As soon as the United States undertook the prosecution of the claim it became their own affair, to be settled and disposed of as any other matter in difference between them and Portugal. Upon this point there can be no dispute. It results of necessity from the relations of the parties. It is equally indisputable that the claim, from its very nature, was referable to the treaty-making power, and, as a necessary consequence, became subject to be settled by any of the methods legitimately within the sphere of that power. Such was the view very properly taken of this subject by the government of the United States, and it acted accordingly.

The negotiations between the United States and Portugal terminated in a convention entered into on the 26th day of February, A. D. 1851, and subsequently duly ratified on both parts. By that convention it was agreed between the high contracting parties "that the claim presented by the American government in behalf of the captain, officers,



and crew of the said privateer [‘General Armstrong’] should be submitted to the arbitrament of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties.”—(Art. 2.) This mode of settlement is not only recognized by the laws of nations, but it is declared to be “a very reasonable mode, and one that is perfectly conformable to the law of nature, for the decision of every dispute which does not directly interest the safety of the nation.”—(Vattel, book 2, c. 18, § 329.) It is plain, therefore, that the subject-matter embraced by the treaty, and the mode of settlement provided by it, were within the constitutional limits of the treaty-making power.

But a treaty in the United States is the supreme law of the land. Hence this treaty, immediately upon the exchange of the ratifications thereof, became obligatory here as the supreme law upon all courts, both State and federal, and upon all the citizens of the United States. To the extent of its provisions, it concluded the rights of all concerned. As the supreme law, it is a record of such absolute verity that nothing can be averred against it in a court of justice. Individuals may claim rights *under* it according to its legal effect and operation; but it is a complete bar to all claims which may be asserted in opposition to it. It is the supreme law and cannot be questioned.

The treaty being the supreme law of the land we cannot go behind it and inquire whether, before its adoption, the proper preliminary steps were taken. This is a matter entrusted by the Constitution of the United States to the treaty-making department of the government, and its acts concerning it are final and conclusive. Hence, if it was the duty of the President and Senate, before they assented to the convention, to have obtained the consent of the claimants to the provisions in which they were concerned, it will be intended that such consent was obtained, and no averment to the contrary can be received. This results of necessity from the provision of the Constitution of the United States that the President “shall have power by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur,” (Con. of U. S., art. 2, § 2, cl. 2;) and the further provision, that “all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land.”—(Ibid., art. 6, cl. 3.)

Treaties thus made have all the positive binding efficacy of laws, asserting the same supreme authority, and equally demanding implicit obedience. I speak not now of any power of Congress over this subject, but only of the rights of individuals, as they may be affected by a treaty so long as it continues in force. In regard to these, it is as much an obligatory and unquestionable rule as any law of Congress made in pursuance of the Constitution of the United States.

Upon the same principle, the provisions of the treaty could not be either enlarged or restricted; like any other law, they could be executed only according to their true intent and meaning. If, therefore, the sixth article, under its proper construction, excluded the claimants from the privilege of a hearing before the arbitrator, the Secretary of State simply obeyed the law, and but discharged his duty, in refusing to allow them that privilege.

But the petitioner insists that the government of the United States,

in making the treaty without the consent of the claimants, assumed the responsibility of their claim against Portugal, and undertook and promised to pay it. This proposition cannot be sustained, because one of its essential elements is that the treaty was made without the consent of the claimants, and, as I have shown, it will be intended that such consent was obtained, if it were necessary. But an effort was made to sustain it upon the broad ground of a State's obligation to protect its citizens at all times and in all countries. That such an obligation exists cannot be disputed. As here stated, however, it is purely political. Practically, in each State, its development is to be found in the Constitution and laws there established. Protection is the great end and aim of civil society, and it embraces everything which is essential to a man's well being as a member of society. It is in political science, a term of very extensive meaning, and is it is said, but another name for justice, in its broadest acceptance, including everything that is due to man as a social being. It is due to the citizen equally at home and abroad, and to the State as well as to the citizen. It includes both individual and social security. Every political organism which is based upon just principles, and the laws made by and under it, are all framed with especial reference to this great object, and are wise and efficient just in proportion to the success with which it is attained. Hence, it has become a political axiom that "of all the various modes and forms of government, that is best which is capable of producing the greatest degree of happiness and safety, and is most effectually secured against the danger of mal-administration."

Happiness and safety exist in the highest degree where man's right to protection is most extensively recognized and enforced. But, when, either in a controversy between man and man or between the State and one of its citizens, the inquiry is whether the right asserted can be maintained, we must look, not to what the State ought to do, but to what it has done, to its peculiar organism, and to the laws which have been made and are in force under it. If the result of the inquiry be that the right claimed has never been recognized by law—in other words, that the State has never extended its protection to that point—the law may be amended so as to embrace it in future, but for the present, as no right recognized by law has been violated, no wrong denounced by law has been committed. Existing regulations therefore, can afford no remedy in such a case, and the tribunals created to enforce the system as it is are powerless to give relief. Hence, it is apparent that the petitioner's proposition can derive no support from this source. The truth is, that the obligation of a State to protect its citizens is political only in its character, and the failure to fulfill it in any respect can never subject the State to pecuniary liability.

It seems, however, to be considered that if a citizen have a just claim against a foreign nation, and the State to which he belongs does not obtain actual pecuniary satisfaction therefor from the foreign nation, then, that such satisfaction must be made by the State itself. In support of this doctrine, reference has been made to what was said by the lord chancellor in the *Baron de Bode's case*, (16 L. & Eq. R., p. 23,) and to the *dictum* of Mr. Chief Justice Parker in *Farnam vs.*

Brooks. (9 Pick. R., 239.) The lord chancellor said: "It is admitted law that if the subject of a country is spoliated by a foreign government, he is entitled to obtain redress through the means of his own government. But if, from weakness, timidity, or other cause on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country." The *dictum* of Mr. Chief Justice Parker is as follows: There was, perhaps, an obligation on the government of the United States to procure redress for its citizens, or themselves to reimburse them." He referred to certain illegal captures and condemnations by the French and Spanish governments. We find a similar doctrine laid down by Rutherford. I quote what he says somewhat at length: "Not only such injuries as affect a nation immediately in its collective capacity, but such likewise as are done to any of its members, are a justifiable cause of war. For these by the law of nations, are parts of the collective person of a nation; and injuries which are done to parts of this person, are done to the person itself. \* \* \* As a civil society is obliged by the social compact to guard the rights of its several members, so it is obliged likewise by the same compact to guard the common interest of the whole. Unless, therefore, the injury which some of the members have suffered, affects, either in itself or in its consequences, the whole society, or such a part as bears a considerable portion to the whole; however it might justify a war in respect of the nation which has done the injury, it would scarce justify the governors of the nation to which those who have suffered the injury belong, in respect of the duty which they owe to their own society, if they should hazard the safety of the whole by a war, and sacrifice the lives of many and the fortunes of most of their subjects to redress such an injury. In the mean time the duty which the society owes to its injured members is not superseded. Though the society is not obliged to redress them by war when this method of redress is inconsistent with the general interest, yet it is still obliged to secure their rights, and this obligation can be no otherwise discharged than by making them amends out of the public property for what they have lost."—(2 Ruth. In., ch. ix, sec. 11, p. 491.)

We must not understand this doctrine in too broad a sense. When properly understood, it does not seem to me to be either unsound or objectionable. The usual methods by which contending nations terminate their differences, are, (1,) by an amicable accommodation; or (2) by a compromise; or (3) by the mediation of a common friend; or (4) by arbitration; or (5) by an appeal to the sword.—(Vattel, book ii, ch. —, § 326, 333.)—In every case, each nation must determine for itself, to which of these methods it will resort; and its determination must, of necessity, be obligatory upon its own citizens, and especially upon such of them as may be more directly interested in its immediate action. I do not mean to say that these are the only methods of settlement recognized by the law of nations. I mention these, now, merely to illustrate my views. At home, the citizen lives under the protection of the municipal laws of his country. They define his domestic rights (if I may so speak) and provide the remedy for every privation of them. When he goes abroad, his country's protection still follows him; but in his relations with foreign states,

the law of nations defines his rights, and points out the remedy for any wrong which he may suffer. The obligations of his own country to him are the same at home and abroad. If he needs redress for a wrong which has been done him by a fellow-citizen, he obtains it in the ordinary courts of justice by the remedy prescribed by the municipal law for his case. And so, if he be injured by a foreign nation, his own country asserts his right to redress according to some of the methods recognized as appropriate by the law of nations. Thus far, in the experience of the world, it has not been found practicable for a state to fulfill its political obligation to protect its citizens in such cases, otherwise than by providing for the first, the ordinary courts of justice and the remedies used therein; and for the second, the proper organization to enforce against a foreign state the methods of redress acknowledged by the laws of nations. But, for the failure of a citizen to obtain redress for an injury, a state is in no respect any more subject to a pecuniary liability to him in the one case than in the other. If, therefore, a state, whose citizen has been injured by a foreign nation, enforce his claim by any of the methods which I have noticed, it has fully discharged its obligations to him. The doctrine of the lord chancellor, in the Baron de Bode's case, has no application to such a case.

A state whose citizen has been injured by a foreign nation may, by virtue of the *eminent domain*, for motives of public policy and to advance the general good, generously forgive the injury; or, it may, for a consideration, release the claim to indemnity. In such a case, it does not seek *redress* for the injury, or attempt to *secure the rights* of its citizens; but, on the contrary, it appropriates his private property to public use. As this is done for the public advantage, the state is bound to indemnify the citizen; for, otherwise, the burdens of the state would not be supported equally, or in a just proportion.—(Vattel, book i, ch. 20, § 244; book iv, ch. 2, § 12.)—It is to such a case, and to such a case only, that the doctrine in the Baron de Bode's case is applicable.

An effort has been made to bring this case within the doctrine of the Baron de Bode's case, as I understand it. The petitioner alleges that "the government of the United States made a treaty with Portugal, whereby she compromised the rights of the claimants, and for a *bonus* agreed to refer the 'Armstrong claim' to arbitration." There is some plausibility in this view. It was upon this point that I concurred in the judgment of this Court, heretofore rendered, directing the taking of testimony in this case. If the United States had *compromised* the claim, the act would, as I have shown, have been obligatory upon the claimants. But there was *no compromise*. And so, if they had parted with the claim for a consideration, the act would, in like manner, have been valid; but there would have resulted an obligation on the part of the United States, either to account for the consideration, or to compensate the claimants. But there was *no bonus*. The United States agreed to accept the proposal of Portugal to pay the other claims provided for in the treaty, and to refer this claim to arbitration. Their authority to do this is clear beyond dispute. The act, therefore, is valid. It is not only valid, but final

and conclusive. The Constitution of the United States makes it the supreme law of the land. It is, moreover, in no sense an appropriation of the private property of the claimants to the public use.

It has been urged that the executive department mismanaged the case before the arbitrator, and that such mismanagement has rendered the United States liable to indemnify the claimants. The alleged mismanagement is as follows: 1st, that the Secretary of State refused to allow the claimants the benefit of a hearing before the arbitrator; 2d, that he did not submit to the arbitrator all the evidence in favor of the claimants; and, 3d, that the award was not within the submission, and ought, therefore, to have been rejected.

1. I have already shown that if the treaty, according to its proper construction, excluded the claimants from the privilege of a hearing before the arbitrator, the Secretary but discharged his duty in pursuing the course adopted by him. I do not think he mistook his duty in this respect.

2. The petitioner alleges that the correspondence which passed between the United States and Portugal in the years 1814 and 1815, was not submitted to the arbiter. The Secretary of State, in his despatch to our chargé at Lisbon of March 20, A. D. 1851, said: "When the consent of the arbiter, whichever of the two it may be, shall have been obtained, you will proceed to carry into execution the stipulation of the third article of the convention, viz: to compare and authenticate, jointly with the Portuguese government, the copies therein specified. You will understand, of course, that these copies are limited to such communications as have passed between the American legation and the Portuguese government at Lisbon, and between this department and the Portuguese legation, joined with like compared and authenticated copies of the second and third articles of the convention, and of the protocol." In his despatch to the same, of July 12, A. D. 1851, the Secretary said: "To provide, however, against the omission of any important part of the earlier portion of the correspondence—I mean that which passed in 1814 and 1815, in Rio Janeiro, where the court of Portugal at that time resided, and which it could not have been intended to exclude—I transmit to you herewith a printed copy of the correspondence, as communicated to Congress on the 15th December, 1845." The protocol had already been signed on the 9th day of July, A. D. 1851. The petitioner's reasoning is, that as the correspondence of 1814 and 1815 was not specially mentioned in the despatch of March 20, A. D. 1851, it was not included thereby; and that, as the protocol was signed three days before the despatch of July 12, A. D. 1851, in which it was specially mentioned, bears date, that correspondence was not submitted to the arbiter. But this is palpably a *non sequitur*. The petitioner omitted to notice that our chargé at Lisbon was directed to proceed to prepare the copies to be submitted to the arbiter *when* his consent to act was obtained, and that our minister at Paris received official notice of the President's acceptance of the office of arbiter only a few days before the 1st day of November, A. D. 1851. Now, although it was impossible that a despatch, written in Washington on the 12th day of July, A. D. 1851, could have reached our chargé at Lisbon on the 9th day

of the same month, three days before it existed, yet it is not only possible, but so highly probable, that, in the absence of evidence to the contrary, it will be presumed that the despatch of July 12, A. D. 1851, was received by the chargé before the 1st day of the following November. It will, also, in the absence of rebutting evidence, be presumed that the chargé obeyed the instructions contained in that despatch. The petitioner has fallen into the mistake of supposing that the copies to be submitted to the arbitrator were prepared at or before the signing of the protocol, whereas, in point of fact, the instructions given to the chargé were, that he was to proceed to prepare them *when* the consent of the arbiter to act as such was obtained. The protocol itself provided "that so soon as the arbiter shall have signified his willingness to accept the friendly office tendered to him, *copies of all correspondence which has passed in reference to said claim shall be submitted to him.*" It is clear to my mind, upon the evidence submitted, that the petitioner's second allegation of mismanagement on the part of the Secretary of State is wholly unfounded in fact.

3. As to the third allegation of mismanagement. When once the contending parties have entered into articles of arbitration, they are bound to abide by the sentence of the arbitrators; they have engaged to do this, and the faith of treaties should be religiously observed. But it is only upon the points submitted that the parties promise to abide by their judgment. If their sentence be confined within these precise bounds, the disputants must acquiesce in it. They cannot say that it is manifestly unjust, since it is pronounced on a question which they have themselves rendered doubtful by the discordance of their claims, and which has been referred as such to the decision of the arbitrators. Before they can pretend to evade such a sentence, they should prove, by incontestible facts, that it was the offspring of corruption, or flagrant partiality.—(Vattel, book ii, ch. 18, § 229.) These are just principles, and if the award in this case could not have been rejected consistently with them, then it ought to have been received.

The petitioner has urged that the questions of law only, and not the questions of fact, involved in the case, were submitted; and that the award is not within the submission, because the arbiter decided the latter questions. The second article of the treaty is as follows: "The high contracting parties not being able to come to an agreement upon the question of public law involved in the case of the American privateer brig 'General Armstrong,' destroyed by British vessels in the waters of the island of Fayal, in September, 1814, her Most Faithful Majesty has proposed, and the United States of America have consented, that the claim presented by the American government in behalf of the captain, officers, and crew of the said privateer should be submitted to the arbitrament of a sovereign, potentate, or chief of some nation in amity with both the high contracting parties." This language is too plain, it seems to me, to admit of doubt as to its meaning. The high contracting parties not being able to come to an agreement upon the question of *public law* involved in the case, agreed to submit the *claim* to arbitration. The *claim* involved questions both of fact and of law, and it was impossible to decide the *claim*

without deciding the *facts*, as well as the *law* arising upon those facts. The parties did not agree as to the *facts* of the case; but, on the contrary, the evidence submitted by them showed that they disagreed as to those facts. There could, however, be no claim without facts; and if there was no *claim*, there was nothing for the arbiter to decide. Having the *claim* to decide, he was, therefore, obliged first to determine the *facts* and then the *law* of the case. This was the course pursued by him; and, in this respect, he acted strictly within the terms of the submission. It has not been suggested that the award was, in any other respect, not within the submission. The conclusion arrived at by the arbiter, in relation to the facts, may not have been fully justified by the evidence, but it is not so clearly erroneous as incontestibly to show that it was the offspring of corruption or flagrant partiality. There was conflicting evidence upon the points decided; and although we might think that the preponderance was in favor of the claimants, yet that point is not so clear as to enable us to say that a different decision is so manifestly unjust that it must necessarily have been fraudulent. It seems to me, therefore, that the award could not have been rejected by the United States, without a violation of the public faith.

Even, however, if all the mismanagement imputed to the Secretary of State was justly chargeable upon him, it would impose upon the United States no pecuniary liability to the claimants. A government is in no respect an insurance company. It does not, and cannot, guarantee to any persons the fidelity of any of the officers whom it employs. It is not responsible for the misfeasances, or wrongs, or negligences, or omissions of duty of the officers employed in the public service. If the government makes a contract, then it is bound like an individual to perform it, and responsible in damages for a breach of it. If, by any unlawful act of its officers, the money of the citizen gets into its treasury, it is bound by the highest principles of justice and morality to refund it. If, in the exercise of the *eminent domain*, a government takes private property for the public use, it is bound to make just compensation. Such obligations on the part of a government are essential to the preservation of public morals and the liberties of the people, and dictated alike by the highest considerations of public policy and the principles of enlightened justice. But to render a government responsible to its own citizens for the errors, or omissions of duty, or wrongs of its officers, would involve it in endless embarrassment, and difficulties, and losses, which would be subversive of the public interests.—(Story on Agency, § 319.) The exemption of a government from such a responsibility rests, not upon any notion of prerogative, but upon considerations of public policy. In the present state of the world, a different principle would be wholly impracticable.

I have examined this case, it will be perceived, in the form in which it has been presented to this Court, as a *legal* claim against the United States. I am not at liberty to consider it in any other point of view. It may be true that the claimants are entitled to relief on other grounds; but this is a matter for Congress to consider, and Congress will doubtless do justice to the claimants. My opinion is that, as claimants of a *legal* demand, they are not entitled to relief.

GILCHRIST, C. J. : I adhere to the opinion formerly delivered in this case as that of a majority of the Court. My opinion is now, as it was then, that the claimant is entitled to relief.

This case has been pending before the people and government of the United States, in various forms, for more than forty-one years. It has never, until recently, been in a situation to be thoroughly argued and investigated as a question of law and of fact ; although, from the peculiar circumstances attending it, and from the discussions in Congress, it has commanded the attention and excited the interest of the public. We are now to regard it, however, in its relation to individual rights and national liabilities ; and, in this point of view, it requires a careful consideration.

The case is an interesting one in a national point of view, not only because it relates to the duties of neutral nations towards belligerents, but because it raises the question how far a belligerent power is liable to its citizens for losses they have sustained through the neglect of their government to insist that the neutral nation shall perform its obligations. It is also interesting as a brilliant illustration of the gallantry and self-devotion of our countrymen.

The leading facts in the case have been notorious to the American people for more than forty years. On the twenty-sixth day of September, 1814, the American private armed brig General Armstrong cast anchor in the port of Fayal—a part of the dominions of the crown of Portugal—to get a supply of fresh water. In the afternoon the British brig *Carnation*, of 18 guns ; the ship *Rota*, of 38 guns ; and the 74-gun ship *Plantagenet*, came into the port, and anchored about seven o'clock. In the evening four boats approached the General Armstrong. Captain Reid repeatedly hailed them, and warned them to keep off. They continued to approach, when he fired on them and killed and wounded several men. The boats returned the fire, and killed one man and wounded the first lieutenant. The British then retreated ; and about midnight renewed the attack, with twelve boats and about four hundred men, which ended in their total defeat with great slaughter, and the partial destruction of their boats. The American brig carried seven guns, and her crew amounted to ninety men. She had two killed and seven wounded, while the killed and wounded on the part of the British must have been nearly two hundred men. So great was the loss that the *Calypso* sloop-of-war, which arrived a few days after, was sent home with the wounded men. The British commander, Captain Lloyd, finding this mode of attack unavailing, with laudable discretion, anchored the *Carnation* close in shore and cannonaded the brig, when her gallant defenders, finding it useless to resist such an overwhelming force, abandoned the vessel, and she was then safely set on fire by the British.

The kingdom of Portugal was neutral, or professed to be so, in the war between the United States and Great Britain, and Fayal was a neutral port. Any violation of the neutrality of the port, by either of the belligerents, was a breach of the law of nations. The property of belligerents, when within the neutral jurisdiction, is inviolable.



It is not lawful to make neutral territory the scene of an attack on an enemy while within it; and if the law is violated, any capture made under neutral protection, the neutral power must redress the injury and effect restitution.—(1 Kent's Com. b. 3, ch. 7, § 132.) In the case of the *Twee Geluk*, Sir William Scott says that no use of a neutral territory in the purposes of war is to be permitted. "Such an act," he says, "that a ship should station herself on neutral territory, and her boats on hostile enterprises, is an act of hostilities and is not to be permitted."

That there was a violation of the neutrality of the United States by the one party or the other, is indisputable. The British brig merely exercised the right of self-defence, that is, the right of complaint. It is a question of fact, to be determined by the examination of the evidence, which party violated the law by attacking the other. Did the American brig and her ninety men, commit the folly of attacking the British squadron, reinforced as their crews might almost have been by many hundreds of men; or did the British brig, lying, as he imagined, helpless within his reach, attack and carry her at all events; and did he perform the duty which any officer would have adopted if his object were to capture the vessel? This, of itself, would, according to Sir William Scott, be a violation of neutrality. "Suppose," he says, "that direct hostile use should be required to bring it within the law of nations, nobody will say that the British brig's use of her boats to effect a capture is not, in itself, an act of hostilities."—(1 Kent's Com., 118.) The law is clear and indisputable.

The first question that presents itself is a question of fact, is, whether, in this transaction, the British or the Americans were the aggressors. More than forty-one years have elapsed since the capture happened. We are not, however, forced to depend on the testimony of witnesses given for the first time after the event, but from the credit of which, time and the failure of memory early require us to make some deduction. We have the testimony of those who were actors in the transaction, of the circumstances of the occurrence, and with every opportunity of knowledge, agreed by the counsel on both sides that the facts were as both before us, and the various questions in the case, are to be decided with a skill and ability that leave nothing to be desired. We endeavor to examine the evidence, irrespective of the feelings of the United States and Great Britain were the national feeling that might be excited by the capture, which took place in the harbor of Fayal. I shall examine the testimony of the witnesses, both American and British, who were actors in the transaction.

On the 27th day of September, 1814, Samuel Johnson, of the *Armstrong*; Frederick A. Worth, the first lieutenant; Benjamin Starks,

Brosnahan, surgeon; Robert E. Allen, captain of marines; Thomas Parsons, James Davis, Eliphalet Sheffield, and Peter Tyson, prize masters of the brig, made oath before Mr. Dabney, the American consul for the Azores, to a declaration and protest, the material parts of which are as follows: "That he (Reid) sailed in and with said brig from the port of New York, on the ninth day of September last past, well found, staunch, and strong, and manned with ninety officers and men, for a cruise; that nothing material happened on the passage to this island, until the twenty-sixth instant, when she cast anchor in this port, soon after twelve o'clock at noon, with a view to get a supply of fresh water; that during the said afternoon his crew were employed in taking on board water, when about sunset of the same day the British brig-of-war *Carnation*, Captain Bentham, appeared suddenly, doubling round the northeast point of this port; she was immediately followed by the British ship *Rota*, of thirty-eight guns, Captain P. Somerville; and the seventy-four gun ship *Plantagenet*, Captain Robert Lloyd; which latter, it is understood, commanded the squadron. They all anchored about seven o'clock p. m., and soon after, some suspicious movements on their part, indicating an intention to violate the neutrality of the port, induced Captain Reid to order his brig to be warped inshore, close under the guns of the castle; that in the act of doing so four boats approached his vessel, filled with armed men. Captain Reid repeatedly hailed them, and warned them to keep off, which they disregarding, he ordered his men to fire on them, which was done, and killed and wounded several men. The boats returned the fire and killed one man, and wounded the first lieutenant; they then fled to their ships and prepared for a second and more formidable attack. The American brig, in the meantime, was placed within half-cable's length of the shore, and within half-pistol shot of the castle. Soon after midnight, twelve, or as some state, fourteen boats, supposed to contain nearly four hundred men, with small cannon, swivels, blunderbusses, and other arms, made a violent attack on said brig, when a severe conflict ensued, which lasted near forty minutes, and terminated in the total defeat and partial destruction of the boats, with an immense slaughter on the part of the British. The loss of the Americans in the action was one lieutenant and one seaman killed, and two lieutenants and five seamen wounded. At daybreak the brig *Carnation* was brought close in, and began a heavy cannonade on the American brig, when Captain Reid, finding further resistance unavailing, abandoned the vessel, after partially destroying her, and soon after the British set her on fire. The said Captain Reid, therefore, desires me to take his protest, as he by these presents does most solemnly protest, against the said Lloyd, commander of the said squadron, and against the other commanders of the British ships engaged in this infamous attack on the said vessel, when lying in a neutral, friendly port; and the said Captain Reid also protests against the government of Portugal, for their inability to protect and defend the neutrality of this their port and harbor; as also against all and other state or states, person or persons, whom it now doth or may concern, for all losses, costs, and damages that have arisen or may arise to the owners, officers,

and crew of the said brig General Armstrong, in consequence of her destruction, and the defeat of her cruise, in the manner aforesaid."

It will be perceived that Captain Reid and his officers state that some suspicious movements, indicating an intention to violate the neutrality of the port, induced Captain Reid to order his brig to be warped inshore, close under the guns of the castle; "that in the act of doing so, four boats approached his vessel filled with armed men. Captain Reid repeatedly hailed them, and warned them to keep off, which they disregarding, he ordered his men to fire on them, which was done, and killed and wounded several men. The boats returned the fire, and killed one man and wounded the first lieutenant."

Here ten witnesses, upon whose veracity no imputation has been cast, and who had the means of observation, give an account of a transaction which happened under their own eyes, and in which they took a part.

On the other side is the deposition of Lieutenant Robert Fausset, sworn to on the 27th of September, 1814, before the British consul at Fayal, who states that, "on Monday, the 26th instant, about eight o'clock in the evening, he was ordered to go in the pinnace or guard-boat, unarmed, on board his Majesty's brig Carnation, to know what armed vessel was at anchor in the bay, when Captain Bentham, of said brig, ordered him to inquire of said vessel, which, by information, was said to be a privateer. When said boat came near the privateer, 'they hailed to say the Americans,' [which probably should be 'the Americans hailed,'] and desired the English boat to keep off, or they would fire into her; upon which Mr. Fausset ordered his men to back astern, and with a boat-hook was in the act of so doing, when the Americans, in the most wanton manner, fired into the said English boat, killed two and wounded seven, some of them mortally; and this, notwithstanding said Fausset frequently called out not to murder them, that they struck and called for quarters. Said Fausset solemnly declared that no resistance of any kind was made, nor could they do it, not having any arms, nor, of course, sent to attack said vessel. Also, several Portuguese boats, at the time of said unprecedented attack, were going ashore, which, it seems, were said to be armed."

This deposition is said, in the letter of Count Tojal to Mr. Hopkins, of September 29, 1849, to be "confirmed under oath by the master and one seaman of that barge."

The contradictions are, that the protest says the boats were armed, while Fausset says they were unarmed; the protest says the fire was returned, while Fausset says they made no resistance; the protest says four boats approached the brig, while Fausset says he approached with the pinnace only; the protest says that the boats disregarded the warning of Captain Reid to keep off, and that then he fired; Fausset says that upon being ordered to keep off he ordered his men to back astern, and was in the act of doing so when the Americans fired. Upon all these matters, there is the testimony of ten witnesses from the brig, against three from the boat; and of course the weight of evidence is decidedly in favor of the Americans,

admitting all the witnesses to have been equally honest, and to have possessed equal opportunities for knowing the truth.

Now upon this evidence, derived as it is from the actors in the transaction, who are the very best sources of information, no intelligent jury could doubt for a moment that the statements in the protest were proved. They would find the facts to be, as I do, that four armed boats approached the brig; that they were hailed and ordered to keep off or they would be fired into; that they disregarded the warning; that the Americans then fired and killed some of their men; that they returned the fire, and killed one man and wounded the first lieutenant. These facts I find to be proved by the evidence.

But there are some statements in Fausset's deposition, which, to say the least, are singular, and which cast some doubt upon the entire correctness of his story. It appears from his deposition that the British knew that the brig was an "armed vessel," and, "by information, was said to be a privateer." He says that "he was ordered to go in the pinnace or guard-boat, *unarmed*," to the *Carnation*, to know what vessel it was; and the captain ordered him to inquire of the brig. Now, it is singular, that in the evening, in a time of war, the commodore of a British squadron should be so particular as to order the boat to be *unarmed*, and still more singular that Captain Bentham should, at such a time, order an unarmed boat to approach a vessel which he knew to be armed, and supposed to be a privateer, and probably an American privateer. It was not by sending out unarmed boats, under such circumstances, that British naval officers attained for their country, and so long exercised, the sovereignty of the seas; and the British officers, of forty years ago, were not trained in a school that would tolerate such negligence. It is singular, also, that Fausset, who was sent to inquire "what armed vessel was at anchor," did not hail the brig at all; but, instead of lying off at a proper distance and hailing the brig, he was so near, when the Americans hailed *him*, that he says he backed his boat astern *with a boat-hook*! If he went there in his unsuspecting simplicity merely to procure information, was it necessary for him, in that quiet bay, and that moonlight night, to run his boat directly against the vessel's side? Could he not have laid off a hundred feet from the brig, *too far to board her*, but near enough to get an answer to his question? His story is entirely inconsistent with the position that he desired only to know what vessel she was, and strongly confirms the assertion in the protest, both that Captain Reid's warning was disregarded and that the boat returned the fire. It is difficult to understand the purpose of Fausset's allusion to the Portuguese boats, which, "at the time of the attack, were going ashore, which, it seems, were said to be armed," unless it be to intimate that Captain Reid mistook Portuguese armed boats going ashore for English armed boats about to attack his vessel. The Portuguese boats had nothing to do with the affair; this is the only allusion to them, and the fact of their presence in the bay is wholly immaterial. It may be added that Fausset says more than that the boat was *unarmed*, from which it might be inferred that it was unarmed for an assault merely; for he says that "no resistance of any kind was made, nor could they do it, not having *any* arms." He thus

makes the condition of his boat so extremely defenceless, that his story fails to carry conviction with it.

But it is said the Americans fired the first shot, and were consequently the aggressors. That they fired the first shot is clear, but the consequence does not follow that by so doing they were the aggressors. Sir William Scott says, 3 Rob., 136, "that a ship should station herself on neutral territory, and send out her boats on hostile enterprises, is an act of hostility much too immediate to be permitted." That the British did send out their boats on a hostile enterprise, is, I think, too clear to admit of a doubt. What, then, was Captain Reid to do in the face of the moral certainty that the British were determined to capture his vessel? Was he to permit them to come on board; to surrender the brave men who looked to him for an example to be carried to the prison at Dartmoor, or to be compelled to serve against their countrymen in an English frigate? Was he not rather to obey the dictate alike of common sense and military honor, that in doubtful emergencies it is safer and nobler to fight than to retreat. and, beyond all this, had he not a *right*, upon every principle that should animate a commander, having done all that prudence and discretion could ask for, to strike one blow in defence of his ship? I have entirely mistaken the extent of the right of self-defence, if both law and reason did not justify him in firing upon the English boats.

But, even in the absence of direct evidence, the presumption that the boats were armed, and that the intention was hostile, is extremely strong. We were at war with England. When the British squadron came into the port and discovered the American brig, it was well understood that all the vessels present were ships of war. It is absurd to say that these four boats were sent merely to reconnoitre the brig. Such a force was entirely unnecessary for that purpose. Such a thing was never heard of as that, in the evening, in time of war, a naval commander would approach a vessel, which he did not know to be friendly, with four boats filled with unarmed men. And even if Fausset's statement be assumed to be correct, and one boat only approached the brig, it is extremely improbable that, if his boat were unarmed, and his intentions were friendly, he would, without hailing the brig, have come sufficiently near to her to reach her with a boat-hook, when it was just as easy to ascertain what vessel she was without coming so near as to excite suspicion. Especially would he have been cautious not to come too near, when, as the protest states, "Captain Reid repeatedly hailed them and warned them to keep off." It is also worthy of remark that Fausset's deposition made on the 27th of September, 1814, was not produced until thirty-five years afterwards, when it first made its appearance, on the 29th of September, 1849, in the letter of Count Tojal to Mr. Hopkins. It is singular, too, that a new and entirely different version of the transaction is given in the letter of Señor De Castro to Mr. Barrow, of the 3d of August, 1843, in which he says, "it is affirmed on the part of Great Britain, that they (the boats) only carried inoffensive men, who were going ashore from their ships on duty, and that they casually met the American brig when she was preparing to leave the port of Fayal." It is enough to say of this statement that

it directly contradicts Fausset's deposition, and that both cannot be true.

In addition to the positive evidence and the presumptions, there are also the contemporary declarations of the official persons at the island.

Mr. Dabney, the American consul at Fayal, in his official note to the governor of the Azores, dated at nine o'clock in the evening of the 26th of September, 1814, says: "In violation of the neutrality, &c, the ships-of-war of his Britannic Majesty, now lying in this port lately ordered four or five armed boats to surprise and carry off the American armed schooner General Armstrong. \* \* \* The boats were repulsed, but a new and more formidable attack is now feared," &c. On the 28th of September, 1814, the governor of the Azores, Elias Jose Riberio, states in his despatch to his government as follows: "We are now, for the first time, made witnesses to a horrible and bloody combat, occasioned by the madness, pride and arrogance of an insolent British officer, who would not respect the neutrality maintained by Portugal in the existing contest between his Britannic Majesty and the United States of America."

He also says: "I learned that a boat had been sent from the British ships-of-war to examine the privateer, and on its return three others had been sent armed, and that the captain of the privateer, not wishing to allow them to come on board of his vessel, a fire was begun on both sides."

The governor then states that he desired a conference with the British commander, that he "might dissuade him, if he were a reasonable man, from continuing the hostilities begun so insolently, and repeated, to the scandalous contempt of the law of nations."

He further says that he conceives the British commander "was aware of the great evil done by his hostile expeditions in a port not only neutral, but moreover, belonging to an old friend and ally of his nation;" and that he wishes to show him his "resentment on account of the insults committed by him;" nor did he consider his invitation to visit his ship "either proper or decorous."

The British commander, in answer to a request by the governor that he would respect the neutrality of the port, states, on the 26th of September, "that one of the boats of his Britannic majesty's ship under my command was, without the slightest provocation, fired on by the American schooner General Armstrong, in consequence of which two men were killed and seven were wounded; and that the neutrality of the port, which I had determined to respect, has been thereby violated. In consequence of this outrage, I am determined to take possession of that vessel. To this the governor replied: "I must, however, assure you, sir, that from the accounts which I have received, it is certain that the British boats were the first to attack the American schooner."

It appears, also, from the diplomatic correspondence, that the United States always asserted, and that Portugal for a long time admitted, that the British were the aggressors, and that there was a just claim against Portugal.

In the letter of the Marquis d'Aguilar, the minister of foreign

affairs, to Lord Strangford, the British minister, of December 22, 1814, he speaks of "the outrageous manner in which that commander violated the neutrality \* \* by audaciously attacking the American privateer" and of "the base attempt of the British commander, at the time he commenced the unprovoked attack on the American privateer, to attribute those violent measures to the breaking the neutrality on the part of the Americans in the first instance."

He states, also, that the Prince Regent had "directed the minister at London \* \* to require satisfaction and indemnification not only for his subjects, but for the American privateer, whose security was guarantied by the safeguard of a neutral port."

Mr. Sumter, the American minister at Rio, in his letter of January 1, 1815, to the Marquis d'Aguair, speaks of reparation to the Prince Regent of Portugal, for so "rude and degrading an attack upon his sovereign authority."

In his letter to Mr. Sumter, the Marquis speaks of "the manifest violation of his territory (by the British) in the infringement of its neutrality."

In Monroe's letter, of the 3d of January, 1815, to Mr. Sumter, he says: "The growing frequency of similar outrages on the part of Great Britain renders it more than ever necessary for the government of the United States to exact from nations in amity with them a rigid fulfilment of all the obligations which a neutral character imposes."

On the 14th of March, 1818, Mr. Adams, in a letter to the Portuguese minister at Washington, said: "It is hoped your government will, without further delay, grant to the sufferers by that transaction the full indemnity to which they are by the laws of nations entitled."

In the letter of Mr. Dickins, the Acting Secretary of State, of the 20th of May, 1835, to Mr. Kavanagh, the American chargé at Lisbon, he says: "The Portuguese authorities at that place having failed to afford to this vessel the protection to which she was entitled in a friendly port, which she had entered as an asylum, the government is unquestionably bound by the law of nations to make good to the sufferers all the damages sustained in consequence of the neglect so obvious and acknowledged a duty."

Mr. Kavanagh states to Mr. Forsyth, from Lisbon, on the 30th of January, 1836: "It appears that the British commander alleged at the time that the crew of the General Armstrong had provoked the first attack by firing into his boats; but the protest made and signed on the 27th of September, 1814, by Captain Reid and all his officers, and corroborating circumstances, disprove this allegation." He repeats his demand for indemnity in his letter of the 17th of February, 1837, to the Portuguese minister of foreign affairs.

In his despatch to Mr. Forsyth, of the 18th of March, 1837, he states that he had had an interview with the minister, who "spoke of the claim as one which at present could not be considered admissible, and who said that "the Portuguese force at Fayal was altogether incompetent to protect the privateer against the assailants."

On the 15th of January, 1842, Mr. Webster wrote to Mr. Barrow concerning the claim: "Its justness, I believe, has never been denied. And Mr. Barrow makes the same statement in his letter of May 5

1842, to the Portuguese minister of foreign affairs. Mr. Webster in his letter to Mr. Barrow of the 18th August, 1842, speaking of this claim and of that of James Hall, says: "Both of these claims are regarded as just by this government, and will not be relinquished under the objections heretofore made to them by the Portuguese government, which are entirely unsatisfactory."

Mr. Barrow, in his letter of February 20, 1843, to Mr. Webster, says: "The pretexts for delay in the two former cases (the General Armstrong and James Hall) are of a very frivolous character, and such will continue to be given, I am convinced, until a very decided tone is assumed by our government." On the 20th of March, 1843, he writes: "There has been from the first a manifest disposition, I might say determination, on the part of the Portuguese government \* \* \* to avoid the liability to which they are subject by the law of nations in the case of General Armstrong."

Such are the contemporary declarations of witnesses who saw the transaction; the indignant remonstrance of the governor of the Azores; the admissions of the Portuguese government of the existence of a claim on our part, contained in their demand for an indemnity from England on account of the loss of the brig, and the repeated assertions of our government of a violation of the neutrality by the British. Until the 4th of August, 1843, there had been no denial, but an admission of the justice of this claim upon them. But on that day the Portuguese minister, in a letter to Mr. Barrow, says: "The accounts all agree that the American brig, under the pretext that four boats from the said British vessels were approaching her, fired upon them, killing some of the men and wounding others. \* \* \* It is, however, an undeniable fact the first shot came from the American brig, *thus evidently constituting her the aggressor*, and a violator of the neutrality of the port of a friendly nation."

Now the Portuguese minister must be presumed to have read the evidence on the subject concerning which he thought fit to write a letter, and his most extraordinary declaration that all the accounts agreed that the American brig was the aggressor, must have been made in the face of the letter of the governor of the Azores, of the 27th of September, 1814, that it was "certain that the British boats were the first to attack the American schooner;" and of his other expressions of indignation at the conduct of the British. Whatever it arose from, whether from an inability to appreciate the evidence, a disposition to procrastinate, or an unwillingness to offend the British government, its incorrectness is manifest. It may be remarked, that among the published documents are to be found allusions to the influence of the British minister in hindering the payment of this claim by Portugal. It is singular indeed that the Portuguese government should not have discovered that the evidence proved the Americans to have been the aggressors until twenty-nine years had elapsed since the affair, and until the production of Fausset's deposition, which had slumbered in obscurity during that period. That the British government felt an interest in the matter, appears from Mr. Clayton's speech in the Senate, on the 26th of January, 1855. He says that the British minister "desired to confer with me, on one occasion, in



regard to the matter, but I declined any con the subject. I thought the British governn interfere "

The governor of Fayal made no complaint th violated the neutrality of the port. That d stated, remained to be made by the Portuguese i governor did, however, complain of Captain Ll against his proceedings; and even the mini August 3, 1843, says, that "the government jesty, appreciating the rashness with which neutral port against said brig, had no hesitatio Portuguese government." This statement, ho the British government, as appears from the le Mr. Clay, of the 15th of May, 1850. It does n sary to settle the question of veracity between t

Considering it then as proved, that the Britis the question arises whether it was the duty o to the law of nations, to make pecuniary comp ages sustained by the injured party.

Upon this point the opinion of the governmer as expressed through the various Secretaries much weight. That Portugal was bound to tained, is asserted by Mr. Monroe, Mr. Adar Upshur, Mr. Webster, and Mr. Clayton. Mr. of September 21, 1836, instructs Mr. Kavana the Portuguese authorities the highest amount your judgment a prudent and conscientious m justified in asking, were he prosecuting his ow instructions are given to Mr. Clay in Mr. Cla 8, 1850.

It is doing the eminent men who have occ position of Secretary of State great injustice to alleged that Portugal was liable in damages, their honest convictions, but condescended to vocate. They had no temptation to say what The claim was not made a party question, nor nexion with party politics. There was no call their reputation as statesmen and jurists, upon do not believe to be tenable.

But the case of Portugal is attempted to be p she was unable to protect her neutrality.

To this position there are two answers. In ( March 9, 1850, to Mr. Clay, he says that "n give pecuniary indemnification for damages ar may have been caused in its ports by one bellig it can be shown that it has used all the means protection."

The answer to this is thus strongly put by to Count Tojal, of March 15, 1850. He say means in her power? She had the physical p hundred regular soldiers, some artillery, a fort,

lation of Fayal, about thirty American seamen who requested to be allowed to defend their brethren, great advantage of position, and the immense moral power of right against wrong; these were the means she had. Did she use all or any of them to protect and defend the privateer? Confessedly she did not; she even went beyond mere failure to defend or protect, when she prevented the American seamen from rendering whatever assistance was in their power. And if she did not use *all these means*, is it not clear from his excellency's own argument that she is bound to indemnify?"

The whole tenor of the despatch of the governor of the Azores, of the 28th of September, 1814, shows that he used no means whatever with the British commander but expostulation. Although indignant at the outrage upon the sovereignty of Portugal, the despatch needs only a careful perusal to make it apparent that the governor was paralyzed by the position in which he stood, and that he had no firmness. He seems to take credit to himself for refusing to consent that the American seamen might aid in defending the brig, for taking away from the Americans, as they came ashore, their swords and pistols, and for the energetic feat of ordering the standard not to be hoisted over the castle the next morning to show his resentment at the conduct of the British. He mentions, also, his decided act, in seizing two American seamen, who, during a funeral, "gave shouts of joy on account of the fight and retreat in which these officers lost their lives." All these might have been very bold and gallant acts, but, unfortunately for him, his own government did approve of his conduct. The Marquis d'Aguiar, the Portuguese minister of foreign affairs, in his letter to Lord Strangford, of the 22d of December, 1814, says, that if it were not for the idea that he desired to protect the inhabitants from the ravages which the British commander would not have failed to inflict, "the censurable moderation of the governor during these outrages would have induced his Royal Highness to have immediately caused a process to have been instituted for the punishment of that officer." The question is not whether Portugal was a stronger or a weaker nation than Great Britain. It is simply whether, at Fayal, and under the existing circumstances, the governor did what his duty required of him as an officer of a neutral nation; and his government answered that question by saying that he *did not* do his duty. With these facts and admissions, it is almost idle to say that Portugal was not bound to make indemnity, because she was weak. Bynkershoeck says: "If it be the duty of the sovereign to use his utmost endeavors to effect that purpose, it follows that he must do it at his own expense. Nay, by going to war, if other means are not sufficient. Such is the law which is observed among all nations."—(Bynkershoeck's Law of War, by Duponceau, p. 60.)

But admitting, for the sake of argument, that the governor of the Azores used all the means in his power, and was unable to resist the British force, the other answer to the position is, that the law of nations did not relieve her from the obligation to make pecuniary compensation.

Now, if Portugal was unable to protect her neutrality, that was her misfortune. Chancellor Kent says: "If the enemy be attacked,

or any capture made under neutral protection, the neutral is bound to redress the injury and effect restitution."—(1 Kent, 122.) That is, if the enemy be attacked, the neutral is bound to redress the injury; if a capture be made, the neutral is bound to effect restitution. The question here does not relate to the restitution of property captured, but to the redress of an injury from a hostile attack. How is an injury, sustained by reason of an attack upon the property of an enemy's citizen, to be redressed but by paying for the injury done? The position is stated absolutely, and without any provisos or limitations. Can it be that a neutral is bound to restore a ship captured in its waters; but if the ship be captured, and then sunk by the enemy, no duty whatever rests upon the neutral? The same reason which requires a neutral to restore a captured vessel, calls on it also to make compensation where a vessel is destroyed. The same principal lies at the foundation of either duty. The position that a neutral is bound to make restitution, but not compensation, may thus be stated: If the neutral sees a ship captured in its waters, and is able to effect restitution, it is bound to do so. But if restitution cannot be made from whatever cause, then the neutral is to remonstrate to the belligerent who has done the wrong, and who knows that the neutral has done all it could; and if the belligerent refuses to do anything in the matter, still the law of nations is satisfied and the affair is settled. Such was the course adopted in the present case. The vessel was destroyed by the British, and the neutral remonstrated; consequently, the neutral was absolved from all obligation to make compensation. This distinction between restitution and reparation, although inappreciable by the unassisted reason, may exist in virtue of some mysterious *afflatus*, which is supposed to inspire the councils of diplomatists. It is enough to say that it deprives the law of nations on this point of all vitality, and reduces it to a solemn absurdity. When a ship is destroyed this distinction releases the neutral from the obligation to do what is physically impossible, but it absolves the neutral from the duty of doing the only thing in its power, that is, to effect reparation.

It is unnecessary to take the position that a neutral is bound always to have in all its ports a force sufficient to resist any attack that might be made. This would be unreasonable; for even England, with her powerful navy, could not accomplish it. But it is equally unreasonable to say that because a neutral did not happen to have at any given place a sufficient force to protect its neutrality, therefore it is absolved from all duty, happen what may. That Portugal, relatively to England, was a weak nation, may be admitted. But she assumed to be neutral in the war between England and America. As she claimed the rights, so she was subject to the obligations of neutrality. If she was not strong enough to cause herself to be respected as neutral, she should not have placed herself in that position. She chose her part in the great republic of the world, and stood in relation to other nations upon a common ground with them. It is said by Vattel, Prel. ch. § 18, "since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature, nations, composed of men, and considered as so many free persons, living together in the state of nature, are generally equal,

and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom." This is a clear and precise statement by an eminent writer of the reciprocal rights and obligations of nations, whatever may be their relative power. As weakness does not deprive a nation of its rights, it does not release her from the obligations which she owes to other nations. A nation may be weak as regards armies and fleets, but she may be wealthy. It may be a part of her policy to avoid the expenditure of her resources in military and naval preparation. She may choose to lavish her revenue upon the empty forms and pageantry of government, disregarding and careless of the advance and happiness of her people. But it would be strange indeed if the course she might see fit to adopt of her own free will should be received as an excuse for her non-performance of the duties which she would exact towards herself from nations whose government might be better administered, and whose revenues might be more carefully expended.

In Molloy's *Treatise De Jure Maritimo*, (b. 1, ch. 1, sec. 16,) a case is stated which affords an exact precedent for the one before us. After mentioning several cases where hostile encounters were forbidden in neutral ports, he says: "But they of Hamburgh were not so kind to the English when the Dutch fleet fell into their road. where rid at the same time some English merchantmen, whom they assaulted, took, burnt, and spoiled; for which action, and not preserving the peace of their port, they were, by the *law of nations*, adjudged to answer the damage, and I think have paid most or all of it since."

It is not to be expected that many precedents are to be found exactly resembling the present case, which was so peculiar in its circumstances. During her long war with France, England, by her powerful navy, was enabled to set at defiance the law of nations in respect to neutrals with impunity; but the case cited from Molloy shows that the English claimed from Hamburgh, in 1665, the same compensation in damages which the present claimants demanded from Portugal. It is unnecessary for me to pursue the investigation of the question as to the liability of Portugal any further. We have the opinion of the most eminent jurists and diplomatists of the United States, the authority of Molloy, and, as I think I have shown, the intrinsic propriety and reasonableness of the position. I have found nothing in the books which deserves to be weighed against these views. Even Flanders, in his *Treatise on Maritime Law*, (p. 45,) although he states as his individual opinion that the reasoning which maintains the obligation of the neutral to answer in damages, seems to him to be inconclusive, admits that it is held by writers on the law of nations that the neutral is bound to redress the loss himself; but he cites no authority to the contrary, and he can find no stronger ground on which to found his opinion than that the neutral is a host extending his hospitality to a belligerent who comes into his port. But, with submission, I conceive that such is not the relation in which the parties stand to each other. A nation which assumes to be neutral has certain duties which she is compelled, by the law of nations, to

perform. It is said by Vattel, (b. 3, ch. 7, § 118 :) "A neutral nation preserves towards both the belligent powers the several relations which nature has instituted between nations. She ought to show herself ready to render them every office of humanity reciprocally due from one nation to another. She ought, in everything not directly relating to war, to give them all the assistance in her power, and of which they may stand in need." It thus appears that the neutral is not a host extending hospitality *ex merâ gratiâ*, but is part of the great republic of nations, bound to render offices of humanity. The parallel of this writer, therefore, fails, and his opinion must fall with the inaccurate figure which he uses to illustrate his views.

My opinion is, that Portugal was bound, by the law of nations, to make to the claimants pecuniary compensation.

The proposition to refer this case to an arbitrator came from the Portuguese government. The course of the United States had been consistent throughout. We had always maintained that we had a valid claim upon Portugal; that the facts showed that the British were the aggressors, and that, by the law of nations, Portugal was bound to redress the injury sustained by our citizens. The first remark on the subject of an arbitration I have found is in Mr. Clayton's letter of the 8th of March, 1850, when he wrote to Mr. Clay, the American chargé d'affaires at Lisbon: "In regard to a reference of our claims to an arbitrator, which has been indicated, the President has directed me to say that no such course will, under the circumstances, receive his sanction, and this for reasons too obvious to need enumeration." On the 30th of April he wrote to the Portuguese minister at Washington that the matter would be referred to Congress "should the Portuguese government persevere in the refusal to adjust and settle what are believed to be the incontrovertible claims of American citizens upon that government," and he rejected the proposition of the minister to submit this claim to arbitration.

The treaty between the United States and Portugal was concluded on the 26th of February, 1851. The first article provides that Portugal shall pay to the United States a sum equivalent to the indemnities claimed for several American citizens. By the second article, it is agreed that the parties, "not being able to come to an agreement upon the question of public law involved in the case of the American privateer brig General Armstrong, that the claim presented by the American government in behalf of the captain, officers and crew of the said privateer should be submitted to the arbitrament of a sovereign, potentate or chief of some nation in amity with both the high contracting parties."

In relation to the arbitration, I may remark that, in whatever I may say upon the subject, I do not mean to be understood as denying the right of the government of the United States, acting for the whole people, to submit to arbitration any controversy with a foreign government in which public interests are alone involved; nor is it necessary to deny the power of the United States to submit to arbitration the claim of one of its own citizens upon a foreign government which it has been prosecuting, in such a way as to preclude itself from again pressing that claim upon such foreign government, or insisting upon



it in any way as a cause of war, or a matter of national concern. There is a broad distinction between the submission of a case involving national interests exclusively and the submission of a case relating to private rights alone, where the only matter of public concern is the general duty of a government to protect its citizens. Where a case of the latter description is submitted, it must be done with a due regard to the rights of the citizen. If his rights be disregarded and sacrificed, it is the dictate alike of law, common sense and justice, that the government by which his rights have been sacrificed should make him restitution. I think it cannot be denied that to relieve a government from liability to a citizen on this account, it should appear that the case was one proper to be submitted; that he had an opportunity of being heard before the arbitrator by arguments and proofs; that the award was certain, definite, and within the submission; and that the arbitrator did not exceed his powers.

In the first place, I am unable to perceive what good and sufficient reasons there were that required the United States to submit the claims of their citizens upon a foreign government to arbitration. I find no reasons alleged in the correspondence that led to the submission. A citizen of this republic is entitled to ask his government, respectfully, why a given course was pursued in relation to his private rights. The government holds its public powers by no higher tenure than the citizen possesses his private rights. Public powers are delegated, and private rights are possessed, by the will and assent of the people. The day is gone by, at least on this side the Atlantic, when the rights and interests of millions can be settled definitively by diplomatists in secret session, and when no other answer to a complaint is condescended, than that such matters are mysteries of State, into which even the party aggrieved has no right to inquire. We entrust our public interests to our public officers, in the confidence that they will discharge their duty. If those duties are neglected or mismanaged, we find a remedy in the ballot-box. But when a citizen has a claim upon a foreign government which, from the nature of the case, as he is powerless against the foreign government, can only be redressed through the agency of his own government, and that claim is sacrificed by his government, he has no remedy, unless his government will indemnify him. He may surely, with propriety, ask the question why his claim was submitted? In the present case, that the British were the aggressors was a fact, patent, known at the time to hundreds of persons, which we had always asserted to be true, and which the evidence proves to be true. No impartial man can investigate the evidence and reach any other conclusion. Not only is the evidence on the point overwhelming, but such has always been the position taken by the United States from 1814 to 1841, by every administration, every Secretary of State, every American minister, and, until the year 1843, admitted to be true by the Portuguese government itself. If, as Mr. Webster wrote to Mr. Barrow on the 13th of January, 1842, the justice of this claim had never been denied, why did that eminent man consent to submit it to arbitration? What call was there upon him to put it out of the power of the United States to perform that first and most sacred of duties, protection of

the rights of the humblest citizen? A party who has a claim, which no one denies the justice, is a most unfit manager of his business, when he submits it to arbitration, and thereby gives the arbitrator a discretionary authority to allow or reject it at his pleasure. We had always asserted that Portugal was bound by the law of nations to redress this injury; and there is nothing in any part of diplomatic correspondence on our part that tends to show that we ever intended to recede from this position. We had positively asserted that both the law and the facts were with us. We had pressed our views in every form. We had presented a firm but temperate statement. We had resorted to argument. We had finally asserted our fixed determination that the injuries of our citizens must be redressed. Such being our position, the inquiry may properly be made, why the various questions in this case, involving the private rights of American citizens, should be exposed to the hazard of being loosely and partially considered by an European sovereign who, say the least, would be as likely to be influenced by consideration of state policy as by a regard to individual rights. If the government did not see fit to have recourse to arms to enforce the claim, it might, at least, have abstained from compromising the rights of claimants. But when the government were convinced that the facts were as the claimant alleged, the conclusion of law followed of course. The claimants alleged that the British were the aggressors. The government believed that such was the case, and that Portugal was bound to pay the claim. These positions, then, being distinctly taken, it may safely be said, that if this was a proper case for a submission, no case ever existed that would justify a resort to hostilities so long as an arbitrator could be procured to determine the controversy.

But whether this case was, in itself, under the circumstances proper to be submitted to arbitration, there is a further view to be taken of the submission.

On the 13th day of April, 1850, (Doc. 53, page 56,) Count Talleyrand wrote to Mr. Clay that the Portuguese government "will now propose to refer this affair to the decision of a third power." In his letter of July 6, 1850, (Doc. 53, page 73,) Count Talleyrand refers to several claims of American citizens upon Portugal. A list of them is given, with the amount claimed in each. They were ten in number, and the aggregate amount was \$233,327. The amount claimed in the case of the General Armstrong was \$131,600. The others amounted to \$91,727. Count Talleyrand then says: "The government of her Majesty is animated with the same desire, &c., yields to the force of circumstances, and, without again reverting to the justice or injustice of claims presented by the government of the United States, and *ex pro bono pacis*, offers to pay the said mentioned claims, amounting to \$91,727, according to Mr. Clay's account, with the only exception that relating to the privateer General Armstrong. In respect to this claim the undersigned cannot deviate from the proposal heretofore made to Mr. Clay, that of so important a claim being submitted to the decision of a third power."

It is to be noticed that the justice and legality of the claims which Count Talleyrand thus offered to pay had been denied as strenuously as

claim relating to the General Armstrong. Why the Portuguese government were unwilling to pay this claim is indicated by the following extract from the same letter of Count Tojal: "Her Majesty's government, besides the arguments contained in the notes formerly addressed to the government of the United States, finds its judgment, and the manner of weighing the question of the privateer General Armstrong, strengthened with the opinion of her Britannic Majesty's government, which has always deemed this claim of the government of the United States unjust." Why, again, it was necessary for Portugal to ask the opinion of England, is shown by another extract from Count Tojal's letter, in which he says: "The subsisting relations between her Most Faithful Majesty's government and that of her Britannic Majesty oblige the undersigned to communicate to the British government all that has taken place."

But whatever influences operated upon the Portuguese government, and it is not difficult to appreciate them, the proposition made by Count Tojal was not divisible. It was complete in itself. It was not an absolute proposal to pay the other claims, but to pay them, and to submit this to arbitration. As Portugal had, up to the time of the proposition, invariably denied the justice of the other claims, and as she said she offered to pay them and submit this, only *pro bono pacis*, we could not have called on her to pay the other claims, unless we agreed to submit this to arbitration. It would have been unreasonable in the extreme if our government had called upon Portugal to pay the other claims without agreeing to submit this. But that the proposal was one and indivisible is, I think, too clear to admit of question, or to need argument in its support. When, therefore, our government decided to accept the proposal, as it did by Mr. Webster's letter of the 23d of August, 1850, it assumed the right, which, in the present case I am not disposed to deny or inquire into, of exposing the claim of the owners of the General Armstrong to the chances of an arbitration, for the purpose of procuring thereby the settlement of the remaining claims upon Portugal, and of putting an end to all embarrassing negotiations with that power.

The case does not call upon me to deny the right of the United States to submit to arbitration the claim of a citizen upon a foreign government without his assent, or even against his protest, and the question need not be investigated. Of course, his assent would estop him afterwards from objecting that a submission was entered into. As there is evidence upon this point, I have examined it for the purpose of showing the relative positions of the claimants and the United States.

On the 5th of September, 1850, Mr. Reid, the agent of the claimants, wrote to Mr. Webster: "I perceive it is proposed to refer the claim of the owners of the brig General Armstrong to the King of Sweden for arbitration. I hope the Department of State will make no final arrangements in this case, under the present circumstances, and I desire that it may be left open until I can have a conference with you on the subject. \* \* \* I hope no steps will be taken which will compromise the rights of the claimants until I can have the pleasure of seeing you." To this letter Mr. Webster answered, on



the 13th of September, that the proposition of Count Tojal to several claims preferred by the American government against Portugal, with the exception alone of that of the General Arm which was to be referred to the King of Sweden, &c., had been accepted by the government.

I look in vain here for any evidence of assent to the substance. When Mr. Reid hears that it is proposed to submit the claim, he hopes that the matter will be left open until he can have a conference with Mr. Webster, and that no steps will be taken that will compromise the rights of the claimants until he can see him. I words mean the very reverse of what they express? Does Mr. Reid mean, when he uses this language, to say that he assents to the submission? If so, language was given to us to disguise our thoughts and not to express them. But not only does he not assent to the submission, but it was agreed to without an opportunity for an assent or dissent, and without his knowing anything about it; for Mr. Webster informs him that the proposal of Count Tojal had already been accepted. If there ever were a plain case of dissent, it is furnished by Mr. Reid's letter. There is no evidence of his acquiescence in the submission, for all he did was to request that he might be heard before the arbitrator, after he was informed that the treaty had been concluded.

It may be proper to notice, in this connexion, a position taken by the Solicitor, that a claimant in a case like this is conclusively bound by the action of his government. In the instructions to Mr. Forsyth, of the 21st of September, 1836, Mr. Forsyth says: "It is understood that, after asking the interference of their government to procure redress for the injuries they suppose themselves to have sustained, the parties must abide by such settlement as that government may make." This proposition cannot be correct in the language used. No individual can urge his claims upon a government with any hope of success, excepting that derived from their sense of justice. A private person, armed with no power to enforce his rights, and unassisted by his own government, cannot speak in sufficiently impressive tones to insure his being heard by a foreign nation. His own government, in the discharge of the duty of protection which it owes to its citizens, must speak for him. If any complaint is to be made on the part of the captured, it must be made by his government to the neutral government for a fraudulent, unworthy or unnecessary submission to a violation of its territory (1 Kent's Com., 121.) If Mr. Forsyth's statement be correct, a government would be justified in making use of and surrendering the claim of one of its citizens for the purpose of procuring the peace of the claim of another. If, by saying that "the parties must abide by such settlement as the government may make," it be meant that the party, after such settlement has been made, cannot maintain his claim against the foreign state, the position is correct. But if it be meant that, whatever settlement the government of the claimant may make, it incurs no responsibility for the claim to its own citizens, the doctrine cannot be admitted. In the case of the *Baron De Bunsen vs. Regina*, 17 Eng. L. & Eq. Rep., 14, Lord St. Leonards, the

Chancellor, said : " It is admitted law that if the subjects of a country be spoliated by a foreign government, he is entitled to obtain redress from the foreign government through the means of his own government. But if, from weakness, timidity, or any other cause on the part of his own government, no redress is obtained from the foreigner, then he has a claim against his own country. Here is a compromise of the two governments ; the question is, how far his claim is affected by it." It cannot be supposed, however, that Mr. Forsyth intended to convey the idea that whatever course the government might pursue, in no event would it be liable to the claimant. Such a proposition would be, in substance, that the government is not responsible for wrong ; a ground which, I presume, no one would seriously attempt to maintain.

Before examining the objections that have been made to the award, it is proper to consider the position taken by the claimants, that they were not permitted to be heard before the arbitrator.

The treaty having been ratified by the Senate on the 7th of March, 1851, on the 19th of March Mr. Webster wrote his letter of instructions to Mr. Hadduck, who had succeeded Mr. Clay as our chargé at Portugal. The material part of this letter refers to the third article of the treaty, which is as follows:

" So soon as the consent of the sovereign, potentate, or chief of some friendly nation who shall be chosen by the two high contracting parties, shall have been obtained to act as arbiter in the aforesaid case of the privateer brig ' General Armstrong,' copies of all correspondence which has passed, in reference to said claim, between the two governments, shall be laid before the arbiter, to whose decision the two high contracting parties hereby bind themselves to submit."

Mr. Webster directs Mr. Hadduck " to compare and authenticate, jointly with the Portuguese government, the copies therein specified. You will understand, of course, that these copies are limited to such communications as have passed between the American legation and the Portuguese government at Lisbon, and between this department and the Portuguese legation in Washington." On the 12th of July, 1851, Mr. Webster wrote to Mr. Hadduck, and after stating the instructions contained in his previous letter, says : " To provide, however, against an omission of any important part of the earlier portion of the correspondence—I mean that which passed in 1814 and 1815, in Rio Janeiro, where the court of Portugal at that time resided, and which it could not have been intended to exclude—I transmit to you, herewith a printed copy of the correspondence, as communicated to Congress on the 15th December, 1845." This letter, however, reached Mr. Hadduck too late, as the treaty had been signed on the 25d of June previous. The papers omitted were the whole of document 14 of the Senate, 1st session 29th Congress, covering fifty-eight pages. It is said that the whole of this document is contained in substance in the subsequent correspondence. One letter, however, was omitted, upon which much stress was laid in the argument on the question of fact, as to the party who made the first aggression. This was the letter from Mr. Greaves, the British consul, dated on the 27th of September, 1814, to the governor of the Azores, informing

him that if the governor should permit the masts to be taken from the schooner, the commander of the squadron would regard the island an enemy of his Britannic Majesty, and would treat the town and castle accordingly. This was relied upon as tending to prove that Captain Lloyd desired to capture the brig and use her in his operations against this country.

But not only was no provision made for laying before the arbitrator all the correspondence which might throw light upon the case, but the claimants were refused the privilege of being heard before the authority which was to decide upon their rights. Upon the 7th July, 1851, the agent of the claimants filed at the Department of State a written argument and statement of facts, which he requested might be sent to our minister, that he might submit it to the arbitrator, which was verbally refused, on the ground that the terms of the treaty precluded it. To two notes to the Secretary of State, to the same effect, he received no answer. He then requested the President that he might be sent to France with the papers and documents that he might present his case through Mr. Rives; but this was refused.

It may well be asked here, why was the case so submitted that the party interested could not be heard? If the United States, in the plenitude of their power, see fit to submit the claim of a citizen to arbitration without his assent, ought they not to make the most careful and ample provision that he shall be fully and fairly heard, and that he shall have all reasonable opportunity to lay before the arbitrator the evidence on which he relies? An award made without the party having had an opportunity to be heard, rests neither upon law nor justice. If the case was sufficiently national in its bearings to be submitted to the arbitration of an European prince, it was, surely, important enough to deserve a careful investigation into the facts, and the parties whose pecuniary interests were involved were the persons, of all others, to whom to entrust such an investigation.

The position, that every party should have an opportunity to be heard before the tribunal that is to pass judgment on his rights, needs no labored argument to support it. It has been repeatedly asserted by the most eminent jurists. In *Rigden vs. Martin*, 6 H. & John 403, the court said: "That the parties ought to have notice of the time of meeting, is a position so strongly supported by common justice that it would seem not to require the aid of authorities. Every man ought to have an opportunity afforded him to be heard in defense of his rights." In *Falconer vs. Montgomery*, 4 Dallas, 232, it is said: "The plainest dictates of natural justice must prescribe to every tribunal the law that 'no man shall be condemned unheard.' It is not merely an abstract rule, or positive right, but it is the result of long experience and a wise attention to the feelings and disposition of human nature. \* \* \* Besides, there is scarcely a piece of written evidence, or a sentence of oral testimony, that is not susceptible of some explanation, or exposed to some contradiction; there is scarcely an argument that may not be elucidated so as to insure success, or controverted so as to prevent it. To exclude the party, therefore, from the opportunity of interposing in any of these modes (which

the most candid and intelligent, but a disinterested person, may easily overlook) is not only a privation of his right, but an act of injustice to the umpire, whose mind might be materially influenced by such an interposition." In the case of *Lutz vs. Linthicum*, 8 Peters, 178, Mr. Justice Story said: "Without question, due notice should be given to the parties of the time and place of hearing the cause; and if the award was made without such notice, it ought, upon the plainest principles of justice, to be set aside." In *Elmendorf vs. Harris*, 23 Wend., 628, it was laid down as a fundamental rule of construction in reference to every transaction in the nature of a judicial proceeding, that the contract of submission necessarily implies that the arbitrator is not authorized or empowered to decide the question in controversy, without giving the parties an opportunity to be heard in relation thereto.

Mr. Webster's construction of the 3d article of the treaty, which provided that the copies of the correspondence should be laid before the arbiter, excluded the presentation of any argument. But the article contains no words of exclusion, and it is not to be presumed that the arbiter would have refused to consider an argument for the claimants. The government refused to sanction, in any manner, the presentment of the case of the claimants to the arbiter, and without such sanction no private person would be permitted to intervene, of his own authority, between two nations. If Mr. Webster's construction be correct, then such a treaty, in violation of the plainest principles of justice, should not have been made. If his construction be wrong, then the agent was most unjustifiably hindered by the government from presenting his case. Whatever may be the true construction of the article, the claimants have suffered a wrong at the hands of the government, for which reparation should be made them.

I come now to the consideration of the award, and it is necessary, in the first place, to ascertain the matter submitted to the arbitrator.

The second article of the treaty is as follows:

"The high contracting parties *not being able to come to an agree-  
ment upon the question of public law* involved in the case of the American privateer brig General Armstrong, &c., have consented that *the claim* presented by the American government, &c., should be submitted to the arbitrament of a sovereign," &c.

The claim, then, was submitted, because the parties could not agree upon the question of law. It was not because they could not agree upon the facts, or the amount of the claim. Thus *the matter in dispute* was the simple question of law. As that question should be determined, so must be the award of the arbitrator. But that question was not determined at all, the award being founded solely upon the facts. If this construction of the submission be correct, it follows that the award is void; firstly, because it does *not* settle the matter in dispute, and the matter submitted; and, secondly, because it *does* settle the question of fact, which was not submitted, and thus exceeds the submission.

But there is another view to be taken of the submission. Although the question of law was that about which the parties were unable to agree, the *claim* was submitted, and this comprehends both the ques-

tion of law and the question of fact. Having found the question of fact against the claimants, it is urged that this decision, involving the fact that the Americans were the aggressors, is conclusive against the claimants. Such would, undoubtedly, be the case if the claimants had had the privilege of being heard, by laying before the arbitrator their argument and proofs. But it is to be remembered, that in this case, not only was the submission made without the assent of the claimants—not only were they denied all opportunity of appearing before the arbitrator—but the case, during all the period from the submission to the award, was in no condition to be heard. It had never been prepared for trial. The claimants had done all that was necessary for their immediate purpose; they had presented their claim to their own government, and had requested that it might be urged upon the government of Portugal. Mr. Webster did not suppose that all the evidence had been furnished on which the claimants rested their case, for, on the 15th of January, 1842, he wrote to Mr. Barrow: "If the inadmissibility of the claim is made to depend upon the defect of evidence, or upon any other cause, you will ascertain precisely what further evidence is required in addition to that which has already been communicated by Captain Reid, and will be found on file in your legation." The transaction occurred in the harbor of Fayal, near to the shore, on a moonlight evening, and in the presence of innumerable witnesses. If the facts were to be contested, the claimants should have had the opportunity of procuring the testimony of those who witnessed the affair, and of placing their case in the most favorable light. This privilege is not denied to the humblest suitor in the most petty controversy. It has been denied to these claimants by the action of their government. They are remediless as to Portugal, for all claim is barred by the action under the treaty. Their just rights have been disregarded and sacrificed by the United States; and the question then arises, whether the United States are bound to make them compensation.

In relation to this point, we have the facts that the British were the aggressors; that the owners of the brig had a valid claim upon Portugal for indemnity; that the claim was submitted to arbitration by virtue of the power of the United States to do so, without the assent of the claimants; that the treaty was so worded as, by Mr. Webster's construction, to deprive the claimants of all opportunity of being heard in any manner; that the United States refused to sanction their application to be heard; that they were not heard; that the award was made without their privity, in their absence, and in violation of the universal principle that no one shall be condemned unheard; and that they were entitled to be heard upon every principle of private justice, public law, and that regard to equity and fair dealing, without which neither a nation nor an individual can ever be respected. It is entirely immaterial whether the question submitted was one of law or of fact. Even if we admit, for the sake of argument, that upon the evidence now before us, it was doubtful which party was the aggressor, and even if we admit in the same way that the validity of the claim upon Portugal was a doubtful question, that does not at all affect the right of the party interested to be heard. S

much the greater call was there upon the United States to provide that they should be heard. The principles of justice are universal, and not local. They are as binding upon the Emperor of the French as upon the humblest tribunal. Every step in this affair, from the acceptance of the proposal by Portugal to submit the case to the ratification of the treaty, was the act of the United States alone. The award having been made against the United States, they are answerable to the claimants for the loss they have sustained, upon the principle that a nation, being entitled to the allegiance and obedience of its citizens, is solemnly bound, in return, to protect, not only their persons, but their property. It is said by Vattel, (ch. 2, § 17:) "If a nation is obliged to preserve itself, it is no less obliged carefully to preserve all its members. The nation owes this to itself, since the loss even of one of its members weakens it, and is injurious to its preservation. It owes this also to its members in particular, in consequence of the very act of association; for those who compose a nation are united for their defence and common advantage; and none can justly be deprived of this union, and of the advantages he expects to derive from it, while he, on his side, fulfills the conditions. The body of a nation cannot then abandon a province, a town, or even a single individual who is a part of it, unless compelled to it by necessity, or indispensably obliged to it by the strongest reasons, founded on the public safety."

It is on this duty of protection that the duty of allegiance depends. We owe allegiance to the country where we were born, where we were educated, and under the protection of whose laws we live. To it we owe the sacrifice of our comfort, our property, and our lives, when the occasion requires it. And it is from the existence of these comprehensive duties on our part, that the reciprocal duty of protection arises. Our country is bound to protect our rights as individuals; and if this protection be not afforded us, she is bound to render us such an equivalent as it is in her power to bestow. Against another nation she is bound to assert our claims, for she alone can meet such an antagonist on equal terms. If she neglects the sacred duty of protecting us in our rights, she is bound to make us compensation. These principles are no recent discoveries. They are as old as the institution of civil government. Their recognition by a State is the surest and firmest bond by which the citizen is attached to his government and his country. They embody the same idea expressed by the lord chancellor in the case of the Baron de Bode, to which I have referred, that "if, from weakness, timidity, or any other cause, on the part of his own government, no redress is obtained from the foreigner, he (the citizen) has a claim against his own country." In the case of *Farnam vs. Brookes*, 9 Pick., p. 239, Parker, C. J., intimates an opinion that there is an obligation on the government of the United States to procure redress for its citizens, or itself to reimburse them.

In this state of things, it appears to me that the United States made use of the Armstrong claim for the purpose of procuring a settlement of the other claims upon Portugal. The substance of the agreement was, that Portugal would pay the other claims if the United States

would submit this to arbitration. This was the actual effect of the negotiation. The United States were willing to incur the chances of arbitration for the consideration thus agreed to be paid to them, but if it should result unfavorably to the claimant, they would be bound to indemnify him. They voluntarily placed themselves in position of taking private property for the public use, for which, the fifth article of the amendments to the Constitution, they were bound to make compensation. This duty is recognized by all writers on public law. Puffendorf says: "But, however, without dispute they that have lost or sacrificed that fortune to the public safety, such extremities, ought to have a restitution or satisfaction made them, as far as possible, by the whole community."—(B. 8, ch. 5, § 1.) "If the nation disposes of the possessions of an individual, the alienation will be valid, for the same reason; but justice demands that the individual be recompensed out of the public money."—(Vattel, b. ch. 22, § 244.) "The necessity of making a peace authorizes the sovereign to dispose of things even belonging to private persons, and the eminent domain gives him this right. But these cessions being made for the common advantage, the State is to indemnify the citizen who are sufferers by them."—(Vattel, b. 4, ch. 2, § 12.) In the case of *Ware vs. Hylton*, 3 Dall., 199, where a question arose under a treaty of 1783 with Great Britain and a law of Virginia sequestrating debts due to British subjects, Mr. Justice Chase said, (page 24) "that Congress had the power to sacrifice the rights and interests of private citizens to secure the safety or prosperity of the public, I have no doubt; but the immutable principles of justice, the public faith of the States that confiscated and received British debts pledged to the creditors, and the rights of the debtors violated by the treaty, all combine to prove that ample compensation ought to be made to all the debtors who have been injured by the treaty for the benefit of the public." Wheaton says: "A general power to make treaties of peace necessarily implies a power to decide the terms on which they shall be made, and among these may properly be included the cession of public territory and other property, as well as of private property included in the eminent domain annexed to the national sovereignty"—(Elements of Const. Law, part 3, ch. 2, § 7.) And he subsequently says: "The duty of making compensation to individuals whose private property is thus sacrificed to the general welfare, is inculcated by public jurists as correlative to the sovereign right of alienating those things which are included in the eminent domain."

If it be once admitted that a government is bound to protect its citizens, it is immaterial by what name the obligation is called. It may be called a legal obligation or a political obligation. It is enough if the obligation exists. If the government, in the exercise of a political right, or the discharge of a political duty, sacrifice the property of the citizen for the public expediency, I cannot understand what that government is worth to the citizen if he is not to be indemnified. I do not understand that there is any analogy between the sovereignty of the United States and that of a despotic government. There is no strictly speaking, any sovereignty in the United States. The only sovereignty is in the people. The government is but an agency

the exercise of certain delegated powers. As it is not self-existent in fact or in theory, it can have no inherent irresponsibility or sovereignty in the sense in which those words are generally used. Our theory is not that powers and rights descend from the government to the people, and are imparted in such proportions as the government may please. The government is responsible to the people, but a despotic monarch is not responsible to any power. It does not seem to me, therefore, that any argument can be derived from the irresponsibility of the government against its liability. Moreover the United States have themselves submitted the question to us whether they are bound to afford relief. Suppose the President and Senate make a treaty, and complaint is made that by it the private rights of a man have been injured, and the question is sent to this Court for decision, might we not entertain jurisdiction? Such is this case; and any argument against the propriety of an inquiry into the liability of the United States is answered by the fact that it has been referred to us by competent authority, by the United States themselves, to investigate the question whether, upon the facts in the case, the claimant has any ground for relief.

The evidence relating to the damages sustained by the loss of the Armstrong is as follows:

It was proved that the officers and men of the schooner had the same outfits required in the navy of the United States. A. B. Frazer testified that a fair estimate of the value of the articles lost would be as follows:

For Captain Reid .....	\$737 00
For each officer of the 1st class.....	559 00
Do.....do.....2d class.....	198 00
Do.....do.....3d class.....	102 75
Do.....do.....4th class.....	76 00

Peter Taylor, the prize-master, proved the shipping articles, which were produced, and testified that the estimate of the losses was a fair one, and that the valuation was fair upon the schedule of them, which was produced, and that nothing was saved when the vessel was destroyed. Thomas B. Parsons, also a prize-master, testified that the estimate did not exceed the actual loss. James Benson, a seaman on board the schooner, testified that the estimate as to the outfit of the men was correct.

Upon the evidence, therefore, the loss of the officers and crew was as follows:

Captain Reid.....	\$1,037 00
10 officers, 1st class, at \$859 00.....	8,590 00
17 officers, 2d class, at 348 00.....	5,916 00
48 men.....at 202 75.....	9,732 00
14 landsmen and boys, at 76 00.....	2,464 00
Loss of officers and crew.....	<u>27,739 00</u>



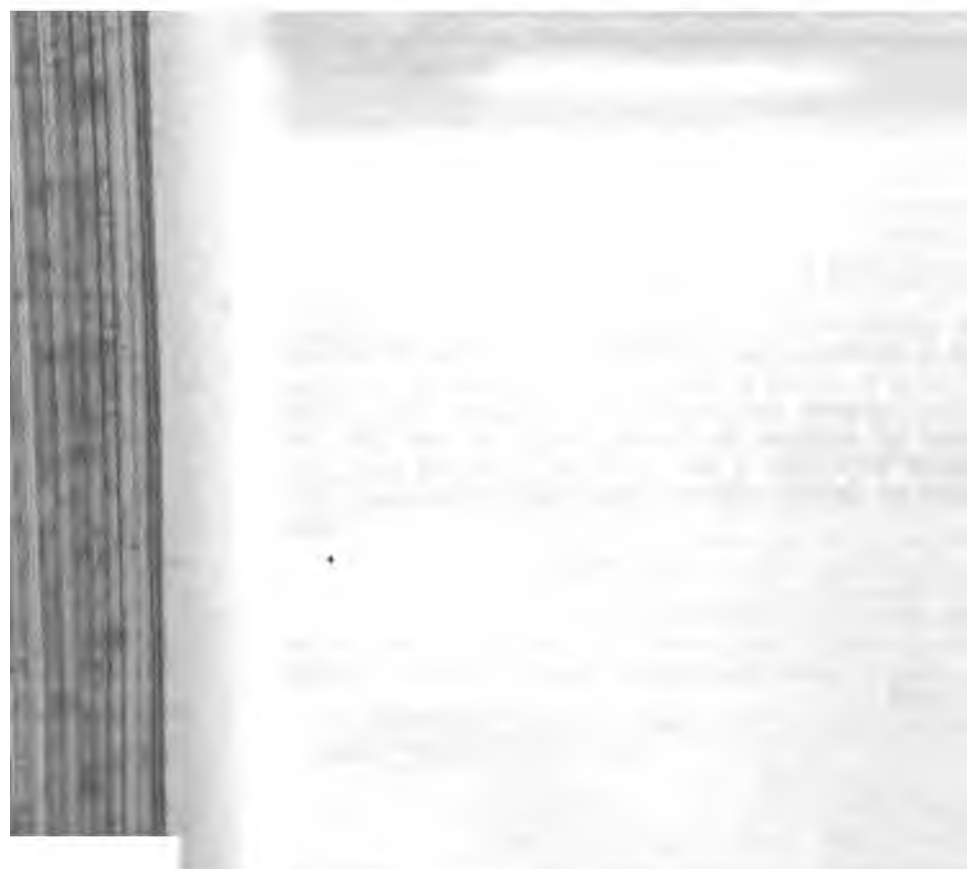
In relation to the value of the Armstrong, it appeared that she carried 246 tons. Mr. B. F. Delano, a United States naval constructor, testified that she would cost \$100 per ton, and her armament would cost \$5,000. Mr. Joseph Tinkham testified that he was a marine surveyor, and was acquainted with the value of ships and their outfits, and knew the Armstrong, and that she was worth from \$100 per ton, exclusive of her armament. When she sailed from New York he thought the ship, her outfits, and armament were worth \$60,000. Henry Coit testified that the contract price for building the vessel was \$28,000, and that from the books, her outfits and armament cost \$15,000. R. R. Havens testified that the vessel was worth \$42,000. Upon the whole of this evidence, the value of the vessel when she sailed from New York, may probably be stated to have been the sum of \$43,000.

The loss of the owners was therefore.....	\$43,000
The loss of the officers and crew was.....	27,700
	<hr/>
	70,700
	<hr/>

And upon this sum the claimants contend that interest should be allowed.

The claimant, Captain Reid, produced in evidence a commission from the President of the United States, constituting him the commander of the Armstrong; and also a power of attorney from the owners of the vessel, and from the various persons, both officers and crew, who were on board and suffered damages by her destruction, authorizing him to act for them, and to receive for them and each of them whatever sum they were severally entitled to from the United States.





IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1858.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the Hon. the Senate and House of Representatives of the United States  
in Congress assembled:*

The Court of Claims respectfully presents the following documents  
as the report in the case of

JOHN ETHERIDGE *vs.* THE UNITED STATES.

1. The petition of the claimants submitted without argument June 30, 1857.
2. Petition to Congress with accompanying documents, marked A, B, C, D, and E, referred by the Senate to the Court of Claims, and returned to that House.
3. Certified copy of a statement of the Secretary of the Navy, dated March 3, 1857, offered by the claimant and transmitted to the Senate.
4. Brief of the United States Deputy Solicitor.
5. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the  
[L. S.] seal of said Court at Washington, this first day of February  
A. D. 1858.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

UNITED STATES COURT OF CLAIMS.

*To the honorable the Court of Claims of the United States, Washington,  
D. C.:*

The petition of John Etheridge, a clerk of the third class in the  
Navy Department, respectfully represents:

That, in the month of August, 1853, your petitioner was assigned  
by the Hon. James C. Dobbin, then and now holding the office of  
Secretary of the Navy, to the desk of principal corresponding clerk

in the Navy Department, to which position there was at that time, has been uninterruptedly since, and is now, added the separate and altogether different office of "Superintendent of the Southwest Executive Building."

The compensation fixed by law to the desk of the principal corresponding clerk of the Navy Department, <i>previous</i> to the appointment of your petitioner, was, as fixed salary.....	\$1,500 00
Temporary addition by act of 31st August, 1852.....	100 00
And as superintendent of the southwest executive building by the "legalizing" act of August 26, 1842.....	250 00
Making the total compensation of the principal corresponding clerk, eighteen hundred and fifty dollars per annum,	<u>1,850 00</u>

By the 3d section of the act making appropriations for the civil and diplomatic expenses of the government, approved March 3, 1853, a classification of the clerks in the several departments was directed to be made from and after the 30th June, 1853, in which classification the principal corresponding clerk of the Navy Department was placed in class *three*, and was designated by the head of the department to hold the additional office of superintendent of the southwest executive building, under the *further proviso* of the 3d section of the act just referred to. The intention of Congress, by the acts of 31st August, 1852, and 3d of March, 1853, as amended by the act of 22d April, 1854, was undoubtedly to increase the compensation of clerks, and there was accordingly added to the pay of the principal corresponding clerk of the Navy Department, by the act approved August 31, 1852, and continued by the classification act approved March 3, 1853, as amended by the act of 22d April, 1854, one hundred dollars per annum; so that the compensation paid to your petitioner, under the acts of 1853-'54, as a third class clerk, has been the same as was paid to the principal corresponding clerk, under the act of 31st August, 1852, viz :

The pay of a third class clerk, under the act of 3d March, 1853, as amended by the act of 22d April, 1854, being	\$1,600 00
And the compensation of the superintendent of the southwest executive building, legalized by the act of 26th of August, 1842, and provided for in the classification act of March 3, 1853, being.....	250 00
Making the total annual compensation eighteen hundred and fifty dollars.....	<u>1,850 00</u>

Your petitioner further represents, that he continued to receive compensation at the rate of eighteen hundred and fifty dollars per annum down to the thirty-first day of March, eighteen hundred and fifty-five; and that the accounts of the disbursing clerk of the Navy Depart-

ment for such payments were audited, revised by the Comptroller, and allowed by the accounting officers of the government down to the said date of thirty-first day of March, eighteen hundred and fifty-five. But your petitioner was informed that in subsequent settlements of the accounts of the disbursing clerk of the Navy Department, the said accounting officers reopened the accounts of the disbursing clerk as far back as the first day of July, eighteen hundred and fifty-four, and disallowed all payments made by him to the superintendent of the southwest executive building from and after that date, based upon an adverse decision made by the Hon. Elisha Whittlesey, Comptroller, in the case of Archibald Campbell, esq., chief clerk of the War Department, who claimed, in addition to his salary of \$2,200 (twenty-two hundred dollars) per annum, the compensation as superintendent of the northwest executive building, during the year ending the thirtieth of June, eighteen hundred and fifty-five.

Your petitioner further represents, that the office of the superintendent of the southwest executive building has not been abolished, nor his appointment thereto revoked; that the duties of the office continue to be devolved on your petitioner, are still performed by him, and that he cannot find, nor does he believe that the legalizing act, approved August 26, 1842, establishing the office, and fixing the salary or compensation, to wit: "one superintendent of the southwest executive building, at two hundred and fifty dollars," as distinct and different from that of clerk, *has ever been repealed, either expressly or by inevitable implication*; but, on the contrary, your petitioner finds it not only recognized and provided for by the very act directing a classification of clerks, to be arranged from and after the 30th of June, 1853, thereby making separate provision for the office of superintendent for an entire year after the classification of clerks took effect, but that the prohibitory enactment of September 30, 1850, against allowing "to one individual the salaries of two different offices on account of having performed the duties thereof at the same time," *expressly excludes* from its prohibition "the superintendents of the executive buildings;" and also, that the prohibition found in the 18th section of the civil and diplomatic act, approved August 31, 1852, extends only to persons "who hold or shall hold any office under the government of the United States, whose salary or annual compensation shall amount to the sum of two thousand five hundred dollars." And your petitioner begs leave further to refer to the opinion of Mr. Attorney General Cushing, of the 18th August, 1853, in the case of L. B. Hardin, who held two offices in the Navy Department, one as clerk, the other as superintendent of the southwest executive building.

And your petitioner states further, that upon his being apprised in November, 1855, of the decision of the Comptroller, Mr. Whittlesey, disallowing the payments made to the superintendent of the southwest executive building for four quarters, three of which had been previously reported upon and passed, allowing the payments therein charged, he addressed a communication to the Comptroller, remonstrating against his decision, and asking his forbearance and reconsideration of the matter involved. The remonstrance is of date 30th November, 1855, a copy of which will be found accompanying the

memorial of your petitioner to Congress. No attention was given to the remonstrance by Mr. Comptroller Whittlesey, so far as your petitioner was informed; its receipt was not officially acknowledged, although that fact was verbally admitted to your petitioner.

And your petitioner adds further, that the Comptroller's report of the adjustment of the accounts of the disbursing clerk of the Navy Department, for the quarter ending 30th September, 1856, continues the disallowances of payments to the superintendent of the southwest executive building, from the 1st of July, 1854, on the ground that there is "no appropriation therefor." Although there is a head of appropriation "*for the general purposes of the southwest executive building,*" viz: "*For labor, fuel, lights, and miscellaneous items,*" which specifies no particular species or kind of labor, fuel, light, or miscellaneous item for which provision is thus made. The entire appropriation being under the supervision and control of the Secretary of the Navy for the purposes indicated, and the labors of the superintendent being of a diversified and miscellaneous character, such as the general care of the southwest executive building, the employment of mechanics and laborers for repairs of the same, the providing of fuel, lights, &c., attending to its security against danger or injury by fire, or other cause, the examination of the accounts for disbursements, &c., the compensation of the superintendent for miscellaneous labor was deemed an *item* legitimately falling under the head of appropriation "*for the general purposes of the southwest executive building.*" It is to this head of appropriation the payments to the superintendents have been charged in the accounts of the disbursing clerk, and to which the Comptroller objects. Your petitioner, however, claims that he is legally entitled to the compensation fixed by law to be paid to the superintendent of the southwest executive building, from the 1st day of July, 1854, until the office shall be abolished, or until he shall cease to hold it.

Your petitioner further adds the assurance, that he knows of no other action taken in his case, by or in Congress, except the reference of the memorial and papers of your petitioner to the honorable the Court of Claims, which was done on the 25th of June, 1856; that no action has been had, except as herein stated, by any department of the government, and that no person or persons, except your petitioner, is owner in part or in whole, or interested therein, unless it be an indirect interest by the disbursing clerk of the Navy Department, in whose accounts the disallowances stand charged.

Your petitioner concludes by saying, he does not deem it necessary to appear before the honorable Court of Claims by counsel. He is willing to rest his case upon its merits, as herein set forth, and perhaps more fully presented in his memorial to Congress, and the paper accompanying it; invoking the honorable Court to hear and determine the same according to the law and the equity of this claim.

Your petitioner, as in duty bound, will ever pray, &c.

JOHN ETHERIDGE.

WASHINGTON, D. C., December 30, 1856.

*To the honorable the Senate and House of Representatives in Congress assembled :*

The memorial of John Etheridge, a clerk in the Navy Department, respectfully represents :

That in the month of August, 1853, your memorialist was assigned by the Hon. J. C. Dobbin, Secretary of the Navy, to the position of principal corresponding clerk in the Navy Department, to which position there was then, has been since, and is now attached the duty of superintending the southwest executive building. The compensation belonging to the desk of the principal corresponding clerk of the Navy Department before your memorialist was assigned to it was, as clerk..... \$1,500  
 Temporary addition by act of August 31, 1852..... 100  
 As superintendent..... 250

Making the total annual compensation..... 1,850

By the third section of the act making appropriations for the civil and diplomatic expenses of the government, approved March 3, 1853, a classification of the clerks in the several departments was directed to be made from and after June 30, 1853, in which arrangement the principal corresponding clerk of the Navy Department was placed in class *three* and was designated by the head of the Navy Department for the further duty of superintendent.

The intention of Congress by its acts of 31st August, 1852 and 3d of March, 1853, was undoubtedly to increase the compensation of clerks, and there was accordingly added to the pay of the principal corresponding clerk of the Navy Department, by the act approved August 31, 1852, and continued to third class clerks by the classification act approved March 3, 1853, one hundred dollars per annum, so that the compensation paid to your memorialist under the act of March 3, 1853, as a third class clerk has been the same, and no more, as was paid to the principal corresponding clerk under the act of August 31, 1852. The pay of third class clerk under the act of March 3, 1853, being \$1,600, and as superintendent \$250, making the total annual compensation \$1,850.

And your memorialist further represents that the duties of superintendent continue to be devolved upon him, are still performed by him, and that he has continued to receive the compensation allowed therefor by the legalizing act, approved August 23, 1842, to wit: at the rate of two hundred and fifty dollars per annum; and which legalizing act, authorizing the office of "one superintendent of the southwest executive building, at two hundred and fifty dollars," as distinct and different from that of clerk, has not been repealed, neither expressly nor by inevitable implication; but, on the contrary, is recognized and provided for by the very act directing a classification of the clerks to be arranged from and after the 30th June, 1853, thereby declaring the office of superintendent distinct and separate from the classification of clerks, and it was expressly excluded from the prohibition contained in the act of September 30, 1850.



And your memorialist further represents, that although his duties as superintendent are still continued, and although he continues to receive the lawful compensation therefor, yet it is within his knowledge that the accounting officers of the treasury, after allowing and passing his vouchers in the accounts of the disbursing clerk of the Navy Department, down to the 31st of March, 1855, (by admitting his balance to be correct, as stated in his account current to that date,) have reopened said disbursing clerk's accounts as far back as the 1st of July, 1854, and have charged back and disallowed all payments made to the superintendent of the southwest executive building, from the 1st of July, 1854.

And your memorialist thinks that, in thus disallowing the payments made to him for services duly recognized and legalized by enactments of Congress, and expressly excluded from the prohibition against any one individual being allowed "the salaries of two different offices on account of having performed the duties thereof at the same time," the intentions of the Congress of the United States have not been met, and more particularly does this appear, from the fact, that instead of the addition directed by the act of 3d March, 1853, of one hundred dollars to the annual compensation of your memorialist, the disallowances made by the accounting officers, really work a reduction of two hundred and fifty dollars from his annual compensation.

And your memorialist adds, that upon the announcement of the decision of the accounting officers, dated November 20, 1855, disallowing the payments made to the superintendent of the southwest executive building during four preceding quarterly accounts, three of which had been previously reported upon and passed, allowing the payments therein charged, your memorialist addressed a communication to the Hon. Elisha Whittlesey, Comptroller, remonstrating against the decision, and asking his forbearance and reconsideration of the disallowances. This remonstrance bears date November 30, 1855, and although six months have elapsed, no reply has reached your memorialist. He therefore prays that the annexed copy of that remonstrance may be received as connected with this memorial.

And your memorialist, therefore, appeals to the Congress, and respectfully ask of your honorable bodies such measure of relief as his case may seem to call for, not by any express appropriation of public money, but by the passage of a resolution or bill authorizing the accounting officers of the Treasury Department to allow in the settlement of the accounts of the disbursing clerk of the Navy Department, the vouchers for payments made to the superintendent of the southwest executive building for miscellaneous labor as superintendent, out of the appropriation "for the general purposes of the southwest executive building," "for contingent expenses of said building."

And, as in duty bound, your memorialist will ever pray, &c.

JOHN ETHERIDGE,

*Third Class Clerk and Sup't Southwest Executive Building.*

NAVY DEPARTMENT,

*Washington, D. C., June 4, 1856.*

IN THE COURT OF CLAIMS.—No. 795.

JOHN ETHERIDGE *vs.* THE UNITED STATES*Solicitor's Brief.*

It appears from the petition and papers in this case that the petitioner held the office and received the salary (\$250 per annum) of superintendent of the southwest executive building, (Navy Department,) in addition to his office and salary of third class clerk, (\$1,600 per annum,) in the office of the Secretary of the Navy, from the month of August, 1853, to the date of his petition, December 30, 1856.

That the payments made to him for his salary from August, 1853, to June 30, 1854, were allowed by the Comptroller, and there is now no question respecting the amount thereof.

That the payments made to him from July 1, 1854, to March 31, 1855, (\$187 50,) were allowed as credits to the disbursing clerk, but subsequently the account was opened, and the amount was charged to the disbursing clerk, who in turn demands the amount from the petitioner.

That the payments made to petitioner for his salary as superintendent subsequent to March 31, 1855, have not been allowed by the accounting officers in favor of the disbursing clerk.

It thus appears that the petitioner has no legal interest in this claim. The Treasury Department holds, not the petitioner, but the disbursing clerk of the Navy Department, liable for the sums in dispute, and the relief sought must, if accorded by the Court, be in the form of a bill to relieve the disbursing clerk from the charges against him on the books of the treasury. But, on the other hand, the disbursing clerk has no real interest in the claim. By the well settled practice in the executive departments, if any payment of salary be rejected at the treasury the officer who receives it is bound to refund. The disbursing clerk suspends his demand upon the petitioner to enable the latter to apply to Congress through this Court, and the latter is therefore the real party in interest.

For many years prior to the year 1842, there was in each of the executive departments a superintendent of the building, who kept it in repair, purchased fuel, supervised the laborers in their daily duties, &c., &c. The superintendent was appointed from the clerks, and was allowed a salary of \$250, in addition to his pay as clerk. This sum was included in the annual estimates, and given by Congress in the general appropriation acts; and the arrangement had no sanction of law beyond the appropriation of an annual sum for the salary of the superintendent. For examples of which, see 5 Statutes, 342, 374, 424. The allowance was not regarded as within any of the acts prohibiting the allowance of extra compensation.

In the first session of Congress under the new administration, which came in on the 3d March, 1841, the Committee of Ways and Means struck out from the annual estimates, and omitted in the annual appropriation bill, all items for which there was not express authority

and that the accounts of the disbursing clerk therefor were settled and allowed by the accounting officers of the Treasury Department, but that those accounts have been opened by those officers, and the payments made to the petitioner since the first day of July, A. D. 1854, disallowed. The evidence on this point is a letter from the Comptroller to the disbursing clerk, dated November 20, A. D. 1855, in which it is stated that in the adjustment of his accounts for the quarter ending on the 30th of June, A. D. 1855, there was found against him a balance of \$250, which was produced by disallowing the amounts paid by him to John Etheridge, as superintendent of the southwest executive building, from the 1st July, A. D. 1854, to 31st March, A. D. 1855, and for April, May, and June, A. D. 1855. There is also on file a letter, dated May 13, A. D. 1857, from the Comptroller to the disbursing clerk, in which it is stated that similar payments to the petitioner for similar services to the 31st day of March, A. D. 1857, had been disallowed.

The petitioner claims that, as the superintendent of the southwest executive building, he is entitled to a salary of two hundred and fifty dollars a year, and he shows, by the evidence, that he has regularly received it from the disbursing clerk. If, then, on the one hand, his view of the law be correct, he has already received all that he is entitled to ; and if, on the other, his view of the law be incorrect, then surely he cannot be entitled to more. It seems to us, therefore, that his case presents no question for adjudication by this Court

Our opinion is, that we cannot grant the petitioner relief.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1858.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

BENJAMIN H. SPRINGER *vs.* THE UNITED STATES.

1. The petition of the claimant and amendment on which testimony was ordered November 29, 1856.
2. Claimant's brief on petition.
3. Depositions of Joseph Smith, Philip C. Johnson, John G. Repplier, and John W. Bronaugh.
4. Letters and statement from the Navy Department in answer to an order from the Court of Claims transmitted to the House of Representatives.
5. Claimant's brief on the facts.
6. Solicitor's brief.
7. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this 1st day of February,  
[L. s.] A. D. 1858.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims*

PETITION.

*To the Honorable Court of Claims of the United States, sitting in Washington, D. C. :*

Your petitioner, Benjamin H. Springer, of the city of Philadelphia, Pennsylvania, respectfully represents: That on the 15th day of January, 1851, he was appointed "agent of the Navy Department, for the purchase of anthracite coal for the use of the navy," as will appear by the Secretary's letter of that date, of which a copy is ap-

of law, and reported for these a separate bill, which passed as the act of August 26, 1842, (5 Stat., 523,) "legalizing and making appropriations for such necessary objects as have been usually included in the general appropriation bill without authority of law," &c. The act, in sec. 1, par. 4, authorized the employment of a superintendent of the Navy Department, or southwest executive building.

The provisions of this act were limited by its 6th section to the 20th of July, 1844, but were continued in force by annual acts until June 30, 1854.—(See acts June 17, 1844, sec. 3, 5 Stat., 694; March 3, 1845, sec. 5, *id.*, 764; August 10, 1846, sec. 3, 9 Stat., 96, &c. August 31, 1852, sec. 9, 10 Stat., 98; March 3, 1853, sec. 8, *id.*, 215.)

In the meantime, a proviso in the general appropriation act of September 30, 1850, sec. 1, (10 Stat., 542, 543,) prohibited the allowance to any one person of the salaries of two offices, but from the prohibition the superintendents of the executive buildings are specially excepted.

The general appropriation act of March 1, 1843, sec. 3, (10 Stat., 209,) made provision for classifying the clerks and other employees of the executive departments, and in a paragraph at p. 211, it enacted: "There shall be a disbursing clerk for each of the departments of War and Navy, and the Post Office; not more than three for the Treasury Department at the discretion of the Secretary thereof; and not more than three for the Department of the Interior at the discretion of the Secretary thereof. The said clerks to be appointed out of class four, by the heads of the respective departments, and to receive such sum in addition to their regular salaries as may amount in the aggregate to two thousand dollars per annum. But it shall be their further duty, when designated by the head of the department for that service, to superintend the buildings, and they shall give bonds as required by the independent treasury act," &c.

This classification went into effect on the 1st of July, 1853, and the question at once arose, whether the disbursing clerks were by law required absolutely to perform the duties of superintendents of the buildings, or whether they were required to do so only in the event of being "designated by the head of the department for that service."

The decision of this question depended upon the construction to be given to the paragraph just cited, viz: whether *designated for that service*, meant designated to be disbursing clerks, or designated to superintend the buildings.

The Secretaries of the Navy and of War gave it the latter construction, and declining to require the disbursing clerks to superintend the buildings, appointed in either department a superintendent. As usual appropriation had been made for the fiscal year ending June 30, 1854, both superintendents were paid during that year. The departments estimated as usual for the superintendents' salaries for the next year, (July 1, 1854, to June 30, 1855,) but the appropriation was not made by Congress. In the Navy Department the salary was then paid out of the appropriation for contingent expenses, and, as above stated, allowed by the Comptroller. When, however, a similar payment was made to the superintendent of the War Department building, and presented for the approval of the Comptroller, he reviewed

render his own account according to his understanding of his rights, but this privilege has been denied him, and he now has no remedy except through the interposition of this honorable Court.

On the 29th July, 1853, the Secretary advised the petitioner that his agency was abolished; and the Secretary added, "you will be pleased to complete the orders now on hand, and render your account to the proper bureau for final settlement." The correspondence with the department and with Messrs. Howland and Aspinwall will show what orders were then on hand, and also that your petitioner faithfully performed his duty, as far as he was permitted to do so, though Howland and Aspinwall refused to allow him to inspect certain coals ordered by the bureau to be inspected. The correspondence on this subject will be exhibited when the Court may require it.

Your petitioner insists that he is entitled to his full commissions upon all the coals which he was ordered to inspect during his agency, and which he was ready and willing to inspect, and that such commissions are to be estimated upon the gross amount of charges of all kinds at the port of destination, according to the understanding and usage of the department prior to the transactions herein stated. Upon any other construction of the agreement the allowance to Howland and Aspinwall was improvident and excessive, and grossly unjust to this petitioner. The large commission of ten per centum was doubtless allowed because one-half of that amount was intended to be reserved to the home agents, upon all American coals; and because it was known (as afterwards proved to be the case) that much the larger part of the shipments would be of English coal, upon which the whole commission would be due to Howland and Aspinwall.

Your petitioner has been informed that the claim of John Jamison, late bituminous coal agent, who occupied a similar relation to Howland and Aspinwall in this matter, has been allowed and paid to the full extent of the present demand. It is believed that the correspondence on file in the Navy Department will establish this fact; the petitioner also believes that the correspondence of the department with Howland and Aspinwall will show that both parties at one time understood your petitioner's claim to be of right and as he now states it. But as your petitioner has not been allowed to see that correspondence, he asserts only his belief, and not his knowledge.

The petitioner cannot state his account accurately, for want of information which the Navy Department refuses to give him. To the best of his judgment and belief, the commissions due him by the Navy Department upon the principles herein stated, will amount to a sum between ten thousand and fifteen thousand dollars. He prays this honorable Court to exert its lawful authority to enable him to ascertain all the items of his account; and, believing his demand to be just, according to the legal intent of his agreement with the government, he prays that it may be allowed and reported to Congress for payment. The petitioner is the sole owner of the claim, not having sold or assigned any part of it to any other person.

B. H. SPRINGER.  
BROWN, STANTON & WALKER,  
*Attorneys for the Petitioner.*

UNITED STATES,  
*Eastern District of Pennsylvania,* } *scd.*

On this third day of July, 1855, before me, Charles F. Heazlitt, a commissioner appointed by the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, under the laws of the United States, to take affidavits and acknowledgments of bail, &c., personally appeared Benjamin H. Springer, who being duly sworn, did depose and say, that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be on his information and belief, and as to those matters, he believes it to be true.

B. H. SPRINGER.

CHAS. F. HEAZLITT,  
*United States Commissioner.*

NAVY DEPARTMENT,  
*January 15, 1851.*

SIR: You are hereby appointed the agent of the Navy Department for the purchase of anthracite coal for the use of the navy.

You will receive a commission of five per cent. on the amount of all purchases made by you in this capacity, which commission is to cover all expenses of selecting, purchasing and shipping the coal.

Your duty will be to select anthracite coal under the directions of the department and its bureaus, of the best quality adapted to the purpose for which it is to be used, and to ship it to such ports as may be indicated.

I am, respectfully, your obedient servant,

WM. A. GRAHAM.

B. H. SPRINGER, Esq., *Washington.*

NAVY DEPARTMENT,  
*April 3, 1852.*

GENTLEMEN: You are hereby appointed the agent of the department for furnishing coal for the use of the United States squadron in the East Indies and China seas and Pacific ocean.

The coal is to be delivered at such times and places, and such kinds and quantities, as shall be required by the department or the commander of the squadron before mentioned.

The coal of each kind to be of the best description and quality for the use of war steamers, and be in all respects satisfactory to the officer who may order or require the supply.

For the coal purchased and delivered you will be paid the purchase money, cost of transportation, insurance and unavoidable expenses attending the same, and for your services as agent under this appointment you will be allowed and paid a commission of ten per cent. on the gross amount of supplies, including the above mentioned expenses; provided that, for all American coal shipped from the United

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1858.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled :*

The Court of Claims respectfully presents the following documents as the report in the case of

BENJAMIN H. SPRINGER *vs.* THE UNITED STATES.

1. The petition of the claimant and amendment on which testimony was ordered November 29, 1856.
2. Claimant's brief on petition.
3. Depositions of Joseph Smith, Philip C. Johnson, John G. Repplier, and John W. Bronaugh.
4. Letters and statement from the Navy Department in answer to an order from the Court of Claims transmitted to the House of Representatives.
5. Claimant's brief on the facts.
6. Solicitor's brief.
7. Opinion of the Court adverse to the claim.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Washington, this 1st day of February,  
[L. S.] A. D. 1858.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims*

PETITION.

*To the Honorable Court of Claims of the United States, sitting in Washington, D. C. :*

Your petitioner, Benjamin H. Springer, of the city of Philadelphia, Pennsylvania, respectfully represents : That on the 15th day of January, 1851, he was appointed "agent of the Navy Department, for the purchase of anthracite coal for the use of the navy," as will appear by the Secretary's letter of that date, of which a copy is ap-



pended. In pursuance of the terms of that letter, the petitioner was always allowed and paid the stipulated commission of five per centum upon the gross cost of the coal, including all expenses, whether the same was sent to any part of the United States or shipped to any foreign port. Your petitioner avers that this was the settled construction of his contract with the department, never disputed until the occasion which will now be stated.

By letter of the 3d April, 1852, of which a copy is appended, the Secretary of the Navy appointed Messrs. Howland and Aspinwall, of New York, agents for furnishing coal to the squadron of the United States in the East Indies, the China seas and the Pacific ocean, stipulating to pay them ten per centum upon the gross amount of supplies, including all charges, but expressly providing, "that for all American coal shipped from the United States there shall be deducted from the above commission of ten per centum the commission allowed the agents of the department for supplying coal within the United States."

As your petitioner had been appointed to his agency on account of his experience and his knowledge of the different qualities of coal, the Bureau of Equipment, Construction and Repairs, by letter of June 30, 1852, of which a copy is appended, required him to inspect the various cargoes purchased and shipped by Messrs. Howland and Aspinwall; and (as he learned afterwards,) upon his certificate, before the delivery of the coal in the Pacific, the purchase money for the same was advanced to them by the department. This petitioner faithfully performed the duty assigned him, inspecting the coal shipped sometimes approving and receiving it, and sometimes advising Messrs. Howland and Aspinwall that certain coals proposed to be shipped by them were unsuited to the purpose, and would not be received. Petitioner has reason to believe that the faithfulness of his inspection was distasteful to Howland and Aspinwall, and through their great influence finally led to his dismissal from his agency, as stated hereafter.

On the 1st of July, 1853, the petitioner rendered his quarterly account, which was made out by one of the clerks of the Bureau of Construction, Equipment and Repairs, by direction of the chief thereof, and included commissions upon the gross charges to the port of destination, as now and always heretofore claimed under his original contract. Up to this time the claim was undisputed and fully recognized by the department, and this petitioner was permitted freely to examine the accounts of Howland and Aspinwall, for the purpose of rendering his own.

On the 29th of August, 1853, to his great surprise, your petitioner was informed by the Bureau of Construction, Equipment and Repairs, that his commission of five per centum would be allowed only upon the cost of the coal at the port of shipment; and upon this basis his accounts have been made out by the bureau and paid; always, however, with a protest on his part and a demand of payment according to his understanding of the agreement, and the former usages of the department. Your petitioner has applied for permission to examine the accounts returned by Howland and Aspinwall, so that he might

render his own account according to his understanding of his rights, but this privilege has been denied him, and he now has no remedy except through the interposition of this honorable Court.

On the 29th July, 1853, the Secretary advised the petitioner that his agency was abolished; and the Secretary added, "you will be pleased to complete the orders now on hand, and render your account to the proper bureau for final settlement." The correspondence with the department and with Messrs. Howland and Aspinwall will show what orders were then on hand, and also that your petitioner faithfully performed his duty, as far as he was permitted to do so, though Howland and Aspinwall refused to allow him to inspect certain coals ordered by the bureau to be inspected. The correspondence on this subject will be exhibited when the Court may require it.

Your petitioner insists that he is entitled to his full commissions upon all the coals which he was ordered to inspect during his agency, and which he was ready and willing to inspect, and that such commissions are to be estimated upon the gross amount of charges of all kinds at the port of destination, according to the understanding and usage of the department prior to the transactions herein stated. Upon any other construction of the agreement the allowance to Howland and Aspinwall was improvident and excessive, and grossly unjust to this petitioner. The large commission of ten per centum was doubtless allowed because one-half of that amount was intended to be reserved to the home agents, upon all American coals; and because it was known (as afterwards proved to be the case) that much the larger part of the shipments would be of English coal, upon which the whole commission would be due to Howland and Aspinwall.

Your petitioner has been informed that the claim of John Jamison, late bituminous coal agent, who occupied a similar relation to Howland and Aspinwall in this matter, has been allowed and paid to the full extent of the present demand. It is believed that the correspondence on file in the Navy Department will establish this fact; the petitioner also believes that the correspondence of the department with Howland and Aspinwall will show that both parties at one time understood your petitioner's claim to be of right and as he now states it. But as your petitioner has not been allowed to see that correspondence, he asserts only his belief, and not his knowledge.

The petitioner cannot state his account accurately, for want of information which the Navy Department refuses to give him. To the best of his judgment and belief, the commissions due him by the Navy Department upon the principles herein stated, will amount to a sum between ten thousand and fifteen thousand dollars. He prays this honorable Court to exert its lawful authority to enable him to ascertain all the items of his account; and, believing his demand to be just, according to the legal intent of his agreement with the government, he prays that it may be allowed and reported to Congress for payment. The petitioner is the sole owner of the claim, not having sold or assigned any part of it to any other person.

B. H. SPRINGER.  
BROWN, STANTON & WALKER,  
*Attorneys for the Petitioner.*

1st. The letter of appointment of January 15, 1851, is proved by the deposition of Commodore Joseph Smith, chief of the Bureau of Yards and Docks. This officer also establishes the fact that, after the receipt of that letter, upon the inquiry of the claimant, he gave assurance that the commissions would be allowed on the gross amount of cost, freight, and charges. This assurance was given after the appointment and in explanation of its terms. It was, therefore, a part of the contract.

The same fact is proved by the deposition of Philip C. Johnson, with the additional fact, as alleged in the petition, that, in the case of the agent for bituminous coal, this explanation of the contract was endorsed in writing on the letter of appointment. The parol assurance was equally as valid as the written.

2d. It is also well established, by both the said witnesses, that the coal agents were uniformly paid according to this understanding of the contract. This construction was not only fixed by positive agreement, subsequent to the letter of the 15th of January, 1851, but it was further established and confirmed by the usage of the parties in their regular fulfillment of the contract. In this state of facts, it must be acknowledged, as beyond all controversy, that the claimant's stipulated commissions were to be five per cent. on the gross amount of cost, freight, and charges upon all coal to which their agency extended.

3d. If the foregoing positions be established, then the reservation of the "home agent's commission," in the Secretary's letter to Howland and Aspinwall of the 3d April, 1852, was nothing less than the whole commission to which he was entitled by the settled construction of his contract with the department. This commission was an entirety, and could not be divided or diminished upon any just principle whatever.

4th. The whole circumstances of the case conspire to show, that the double agency of the claimant, and of Howland and Aspinwall, was based upon the ground of an equal division of the commissions, arising from their joint action as to all anthracite coal shipped from the United States. This is not only the true legal interpretation of the Secretary's letters, but it is also the only fair adjustment of the rights of the respective parties. The contrary principle would reduce the claimant's compensation to a mere trifle, while it would raise that of Howland and Aspinwall to a most unusual and extravagant figure.

5th. The relative value of the services of the claimant and of Howland & Aspinwall, is fully established by the testimony of John G. Repplier. This witness also proves the custom of allowing full commissions to the agents for selling coal, even when they do not personally make the sale.

Commodore Smith proves that the claimant was required to give up his private business as a coal dealer, in order the more impartially and faithfully to perform his duty to the government.

All the witnesses testify to the capacity and fidelity of the claimant.

6th. From the beginning to the end of his service, the claimant always asserted his right to the full commissions. His accounts were rendered upon this basis.—(See Bronaugh's deposition. See also all the correspondence; and especially claimant's letter to Samuel Hart, chief of the Bureau of Const., Eq. and Rep., dated 1st July, 1853;

and his two letters to the Secretary of the Navy, dated respectively the 23d July and the 11th August, 1853.)

The letter from S. Hart, chief of the bureau, to the claimant, of date the 29th August, 1853, was the first official intimation that the full demand would not be allowed. Thus the claimant was induced to render his services up to the very expiration of his agency with the just expectation of receiving his full commissions, and without any information to the contrary until after his dismissal. It was not just or lawful to withhold them then.—(*Harvey vs. Turner & Co.*, 4 Rawle's Pa. 230.)

7th. Upon these facts, and the authorities cited upon the preliminary hearing, the claimant is entitled to five per cent. of the gross cost, freight and charges upon all coal inspected by him, amounting by the accounts from the department, to \$                      for which we ask the judgment of the Court.

Story on Contracts, sec. 22.

2 Parsons on Contracts, p. 31.

FRED. P. STANTON,  
*For the Claimant.*

IN THE COURT OF CLAIMS  
ON PETITION OF B. H. SPRINGER.

*Brief of United States Solicitor.*

The claim is for five per cent. on the amount paid for the anthracite coal inspected by claimant, and five per cent. on the amount of freight and other charges, as compensation for his services.

The letter of appointment stipulates *expressly* that the compensation is to be five per cent. on the purchases; and the letter to Howland & Aspinwall repeats that this is the rate.

The attempt is made, however, to vary this by parol proof that the understanding was otherwise. I object to the claim on the ground that it is compensation for an agency or office which was not and is not authorized by law, and the department had no right to establish such an agency or office. If the agency be regarded as legal, the contract is contained in the letter of appointment, and its effect cannot be varied by parol proof.—(*Hunt vs. Rousmanner*, 8 Wheat., 174; *Cowan & Hill's Notes*, vol. 2, p. 593, and cases cited.)

The evidence of the construction may be admissible, because practice under an act is a legitimate mode of argument as to what is the construction; but is not conclusive, and if against the plain meaning of the language of the contract, must be disregarded.—(*Cowan & Hill's Notes*, p. 564, vol. 2.)

III. The practice, &c., states also agency for purchase, and not at compensation for inspection, and does not, therefore, apply.

IV. It is argued that the Secretary could not change the compensation; but this is not an agency or office created by law, and therefore, if legal at all, it is subject to the entire control of the Secretary.

V. The services rendered here are not those stipulated for in the original employment, and he can recover nothing but a *quantum meruit*, and Smith testifies that five per cent. was a liberal compensation.

VI. Bronough's testimony on the construction of the contract—conflicting with Com. Smith's testimony—shows that the statement of the petition is not sustained by the claimant's own witness, even if it be competent to vary the written contract by parol testimony.

VII. It appears by Springer's letter that the consideration for the ten per cent. to Howland & Aspinwall was the advance and payment of money for the purchase of coal, freight, charges, &c. The same thing was true of consideration for payment of five per cent.; but here there were no such advances by Springer.

VIII. Repplen's testimony shows that the duty of inspection is less onerous and less important than that of superintending the shipment. With respect to this coal, Springer did nothing but inspect. The witnesses say that if there was a large amount shipped, two and a half per cent. was a liberal commission for inspection.

IX. Letter of July 23, 1853, from Springer, refers to letters to Aspinwall as showing that he was entitled to five per cent. on the gross amount. Now these letters expressly fix the compensation at five per cent. on purchase money of coal. He makes no allusion to this fact in his petition, though it now appears he knew all about it.

X. No evidence is adduced to show that Springer claimed more than five per cent. on the purchase, till July 1, 1853. The answer is given August 29. Was this an unreasonable delay in rejecting the claim?

XI. But whilst it is true that Springer claimed in 1853 five per cent. on the gross amount, his argument (see his letters of July 23, and August 11, 1853) is based on entirely different grounds from that upon which it is here attempted to sustain it. There he attempted only to show that the allowance to Howland & Aspinwall was excessive. True, that he says "the late Secretary, Mr. Graham, gave it as his opinion that the agents were to receive commissions on the gross amount; the late chief of the bureau agreed that his construction of the agreement also gave the same;" but he nowhere says or pretends that there was any *express agreement* to this effect, as he now pretends. Then it was but construction, and he endeavors to support the construction by reference to the letters of April 6, 1852, from Howland & Aspinwall, and of April 8, 1852, in reply. But now, in stating his case, he takes care not to include those letters, because they show conclusively that Howland & Aspinwall, in assenting to the contract set forth in the letter of April 3, say they understand the deductions to be made from their commissions, for the inspectors, "to be one per centum upon the cost of the coal at the port of shipment." In reply, the Secretary informs them "that the commission allowed to agents for inspecting coal, under the Navy Department, is five per cent., and not one per cent., as you were led to suppose."

He sets off now, in his petition, that it was not matter of construc-

tion that he was to have five per cent. on the gross amount, but matter expressly agreed to when he accepted the contract, and alleges an offer to endorse it on the contract; but there is no proof of any such offer, or of any fact from which it can be inferred.

Com. Smith's testimony only proves that he told Springer, *after his appointment*, that the Secretary had ordered five per cent. to be paid on the gross cost of the coal, *as before stated*. He had before stated that he had ordered five per cent. to be paid—not five per cent. on the gross cost. Now, when this language is compared with Springer's own letter, above quoted, it is manifest that Com. Smith's conclusion was founded on a construction of the letter from Mr. Graham to Springer.

Mr. Johnson, the clerk in the office, whose testimony is relied on to prove a different contract from that in writing, merely proves that the chief clerk construed it as allowing commission on the gross cost; while Mr. Bronough's testimony goes to prove that the Secretary entertained altogether different views.

There is not a word of testimony going to show that a different contract was entered into than that set forth in writing. All that is offered is to prove a different construction, by certain officers, from that which the present Secretary put on it. Neither Com. Smith nor Johnson, or any one else, pretends to say that Springer ever did more than inquire as to the construction. No time is fixed by them when the inquiry was made; and no circumstance is proved from which it could be inferred that he had not accepted and acted on his appointment before such inquiry, or that the answer given by them was the reason of his acceptance; and even this would be immaterial, for they had no right to vary the contract. They do not pretend that they were authorized to vary it. The Secretary is the only person who could vary it, and it is not shown that his attention was ever called to the subject after the contract was signed.

M. BLAIR.

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IN THE COURT OF CLAIMS.

BENJ. H. SPRINGER *vs.* THE UNITED STATES.

SCARBURGH, J., delivered the opinion of the Court:

On the 15th day of January, A. D. 1851, the Secretary of the Department of the Navy, by a letter of that date, addressed to the petitioner, says: "You are hereby appointed the agent of the Navy Department for the purchase of anthracite coal for the use of the navy.

"You will receive a commission of five per cent. on the amount of all purchases made by you in this capacity, which commission is to cover all expenses of selecting, purchasing, and shipping the coal."

\* \* \* \* \*

The petitioner, in his amended petition, alleges that after receiving this letter, he inquired at the Navy Department upon what amount the commission of five per cent. therein allowed was to be estimated, and was informed that it would be upon the gross cost of the coal at the port to which it was to be shipped; that the Secretary had endorsed this explanation upon a similar letter addressed to John Jamison, the agent for bituminous coal, and that the same endorsement would be

BENJAMIN H. SPRINGER.

made upon the claimant's letter of appointment, if desired. He further alleges that he was satisfied with the verbal assurance thus given, which he expressly avers was authorized by the Secretary of the Navy, and he accordingly undertook the agency.

The petitioner also alleges that his contract was understood by both parties according to the explanation given to him at the Department of the Navy, and a commission of five per cent. upon the gross cost of the coal at the port to which it was shipped, whether that port was in the United States or a foreign port, until the 29th day of August, A. D. 1853, when he was informed by the Bureau of Construction, Equipment, and Repairs, that he would be allowed a commission of five per cent. only upon the cost of the coal at the port of shipment; and that "upon this basis his accounts have been made out by the bureau and paid; always, however, with a protest on his part and a demand of payment according to his understanding of the agreement and the former usages of the department."

Joseph Smith, a captain in the navy, and chief of the Bureau of Yards and Docks, testifies that the Secretary of the Navy, about the date of the letter of the 15th day of January, A. D. 1851, (he thinks before) asked his opinion in regard to what would be a fair commission to allow coal agents. His opinion was, that for the purchase, inspection, and shipment of the coal, five per cent. would be a fair commission. The Secretary so ordered; and upon that principle the witness has ever since settled with coal agents, paying them five per cent. upon the gross cost, freight, and charges. He further testifies, that he informed the petitioner upon his inquiry, after his appointment, that the Secretary of the Navy had ordered the five per cent. to be paid on the gross cost of the coal as above stated. There is annexed to his deposition a form, in which (he testifies) he directed the petitioner to make out his accounts. This form allows commissions at the rate of five per cent. on the cost of the coal and the freight.

Philip C. Johnson, the chief clerk of the Bureau of Construction, Equipment, and Repairs, testifies that the petitioner presented an account for approval, embracing his commissions on the original cost of the coal, charges for shipment, freight, &c.; that the witness suggested to him that his contract did not specify that he was to have commission on the freight, &c.; to which the petitioner replied that it was understood by the Secretary of the Navy that his commissions were to be estimated on the gross cost of coal, charges for freight, &c.; that, upon application by the witness to the chief clerk of the department, the latter informed him that it was intended by the Secretary that the commissions should be estimated on the whole cost of coal, freight, and other charges of shipment; and that his (the witness') impression is, that the petitioner was uniformly paid according to the instructions which he (the witness) received from the chief clerk. The witness recollects a shipment of coal made by the petitioner to Montevideo, and his impression is, that the commission was estimated in the same manner as for other shipments, that is, according to the instructions he received from the chief clerk, which he regarded the same as if coming to him directly from the Secretary. The witness further testifies that five per cent. on the original cost of the coal shipped by Howland & Aspinwall, and inspected by the petitioner,

has been paid to the petitioner ; and that the petitioner received it under a verbal protest which was made at the time when the bills were approved. There was not to his knowledge any written protest filed.

By a letter, dated April 3, A. D. 1852, addressed by the Secretary of the Navy to Messrs. Howland & Aspinwall, he appointed them the agents of the department for furnishing coal for the use of the United States squadron in the East India and China seas and Pacific ocean. In that letter the Secretary said : " For the coal purchased and delivered, you will be paid the purchase money, cost of transportation, insurance, and unavoidable expenses attending the same, and for your services as agent under this appointment, you will be allowed and paid a commission of ten per centum on the gross amount of supplies, including the above-mentioned expenses ; provided that for all American coal shipped from the United States on this account, there shall be deducted from the above commission of ten per centum, the commission allowed the agents of the department for supplying coal within the United States."

By a letter from Howland & Aspinwall to the Secretary of the Navy, dated April 6, A. D. 1852, they accepted the appointment in the terms stipulated in the letter to them from the Secretary of the Navy, dated the 3d day of April, A. D. 1852, and added : " We also agree to allow out of the commission to be paid to us, to the inspectors of the department, heretofore appointed for inspecting coal used by the United States navy, within the United States, the commission they are entitled to under their arrangement with the department, which commission we understand to be one per centum upon the cost of the coal at the port of shipment."

By a letter, dated April 8, A. D. 1852, from the Secretary of the Navy to Howland & Aspinwall, he acknowledges the receipt of their letter of the 6th of April, then instant, " accepting the appointment of agent of the Navy Department for furnishing coal for the use of the United States squadrons in the East India and China seas and Pacific ocean, on the terms stipulated in the department's letter of the 3d instant," and informed them " that the commission allowed to agents for inspecting coal under the Navy Department is five per cent., and not one per cent., as you were led to suppose."

By a letter, dated April 19, A. D. 1852, from the Secretary of the Navy to Howland & Aspinwall, he requests them " to inform the department if you accept the appointment of agents for furnishing coal for the use of the United States squadrons in the East India and China seas and Pacific ocean, on the terms stipulated in the department's letter of the 3d inst., as explained in the letter of the 8th inst., in regard to the commission allowed the agents for inspecting coal under the Navy Department."

By a letter, dated April 21, A. D. 1852, from Howland & Aspinwall to the Secretary of the Navy, they say : " We beg leave to say, in answer to your letter of the 19th inst., just received, that we accept the appointment you have been good enough to make of us, as agents of the department for furnishing coal for the use of the United States squadron in the East India and China seas and Pacific ocean, on the terms stipulated in the department's letter of the 3d inst., and explained in that of the 8th."

By a letter, dated, June 30, A. D. 1852, from the chief of the Bureau



of Construction, &c., to the petitioner, the former says: "Messrs. Howland & Aspinwall, New York, having been appointed by the department agents for the purchase and shipment of coal for the use of the steamers attached to the China seas, you will be pleased to examine and inspect such anthracite coal as they may from time to time be directed to ship from the United States for that purpose."

By a letter, dated May 10, A. D. 1853, from same to same, the former says: "I have to inform you that instructions have this day been given to Messrs. Howland & Aspinwall, New York, to ship for the use of the squadron in the China seas five hundred tons of anthracite coal per month for four months to come."

By a letter, dated May 18, 1853, from same to same, the former says: "I enclose herewith a requisition from the navy-yard, Gosport, for three hundred tons of anthracite coal, which you will be pleased to furnish at your early convenience."

By a letter, dated August 16, A. D. 1853, from same to same, the former says: "I enclose herewith a copy of an order to ship 300 tons of anthracite coal to Norfolk, under date of the 18th May last, but which the commandant of the yard informs the bureau has not been delivered. You will be pleased to forward this coal without further delay."

By a letter, dated July 29, A. D. 1853, from the Secretary of the Navy to the petitioner, the former says: "It having been determined to discontinue the coal agencies of this department, you are hereby notified that no further orders will be issued to you for the supply of coal for naval purposes, after this date. You will be pleased to complete the orders now in hand, and render your account to the proper bureaus for final settlement."

From the 12th day of May, A. D. 1852, till the 25th day of September, A. D. 1853, Howland & Aspinwall received from the United States for coal, including the original cost of the coal, insurance, and custom-house charges, freight and commissions, the sum of \$144,233 81. The gross cost of the coal on which they received commissions was the sum of \$131,121 64. This sum does not include freight on the coal which was lost. The original cost of the coal was \$34,448 85, and upon this sum a commission of five *per centum*, amounting to the sum of \$1,722 44, has been paid to the petitioner. He claims that he was entitled to a commission of five *per centum*, upon the above sum of \$131,121 64, amounting to the sum of \$6,556 08, and that there is now due him the sum of \$4,833 64, to wit: the above sum of \$6,556 08 — the sum of \$1,722 44 = to the sum of \$4,833 64. See the statement furnished by the Bureau of Construction.

The Solicitor insists that the Secretary of the Navy had no authority in law to create the agency under which the petitioner claims, and that, therefore, he is not entitled to relief. He refers to the 3d section of the act of March 3, A. D. 1809, (2 Stat. at L., p. 536,) and to the act of March 3, A. D. 1843, (5 Stat., at L., p. 617.) If these were the only acts relating to this subject, the Secretary's authority, to say the least of it, would be very questionable. But by the act of September 28, A. D. 1850, (9 Stat., at L., pp. 513, 514,) the following appropriation is made: "For repair of vessels in commission, *including fuel for steamers*, \* \* \* to be bought by the Secretary of the Navy in open market,

\* \* \* one million seven hundred and fifty thousand dollars." This provision seems to be temporary only, but it is a clear departure from the acts referred to by the Solicitor. The act, however, further provides, "that in the article of fuel for the navy, or naval stations and yards, the Secretary of the Navy shall have power to discriminate and purchase, in such manner as he may deem proper, that kind of fuel which is best adapted for the purpose for which it is to be used." This provision is obviously of a permanent character, and is broad enough in its terms to include the power to purchase by means of agencies. It authorizes the Secretary to purchase *in such manner as he may deem proper*. Although, for some reason, the coal agencies were, for a short time, discontinued by the Department of the Navy, yet they have since been revived, and coal agents are still in the employment of that department. We see no good ground to question the Secretary's authority to employ such agents.

The agency, then, in which the petitioner was employed, being a lawful one, the next point of inquiry is, what was the contract by which the agency was created? It has been urged in argument that we are to look for its terms exclusively to the letter from the Secretary of the Navy to the petitioner of the 15th day of January, A. D. 1851. If the agency tendered by that letter had been unconditionally accepted by the petitioner, then it and the unconditional acceptance would have constituted the entire contract, the terms of which would have been found in the letter alone. But it needs no argument to show that the mere letter, without some act on the part of the petitioner, would not of itself constitute a contract. The Secretary of the Navy did not so understand the course of business on this subject. During the negotiation with Howland & Aspinwall in reference to their agency, there was a considerable correspondence in writing between them and the Secretary of the Navy, and even after they supposed that they had accepted the agency on the terms proposed by him, he was not satisfied without an explicit declaration by them to that effect. But the petitioner, instead of entering into a written correspondence with the Department or the Navy in reference to the agency tendered to him, went to that department in person, and being, on inquiry made there of the proper officer, satisfactorily assured by him of the character and extent of the offer which had been made, undertook the agency. That there might be no misunderstanding, he was furnished with a form, in which to make out his accounts, and in which were specified the very items of which they were to consist. The letter of the Secretary, then, and what transpired between the petitioner and the chief of the Bureau of Construction, &c., in relation thereto, including the form furnished by the latter, together constitute the contract between the petitioner and the United States. Such was the understanding at the Department of the Navy, for it is admitted by the Solicitor that all the petitioner's accounts, except those relating to the coal shipped by Howland & Aspinwall, have been settled according to the contract thus constituted; and such indubitably is the correct understanding of that contract. The doctrine that parol evidence shall not be received to explain, contradict, vary, or add to, a written instrument, does not seem to be involved in this case.—(Knapp *vs.* Harden, 6 Carr. & P. 745; 2 Parsons on Con., 65.)

Such being the contract originally made between the United States and the petitioner, it remains but to inquire, whether the petitioner's services in inspecting the coal shipped by Howland & Aspinwall were rendered under it.

The petitioner was a mere agent, with certain specified powers and duties. His powers, in their very nature, were revocable at any time, with or without cause. His duties were to select, purchase and ship anthracite coal for the use of the navy under the directions of the Navy Department; such direction was necessary in every case before he could act; and there was nothing exclusive in the character of his employment. It was competent for the Secretary of the Navy to have employed other agents for the same service, without in any respect violating his contract with the petitioner. The simple inquiry, therefore, now is, can the orders given to the petitioner to *examine* and *inspect* the coal shipped by Howland & Aspinwall be referred to his original contract? They cannot, it is plain, unless they required the same services which were required by the original contract. The petitioner's duty under the original contract was to *select, purchase, and ship* coal for the use of the navy, whilst the orders required him merely to *examine* and *inspect* the coal shipped by Howland & Aspinwall. The latter was a wholly different duty from the former. The coal furnished by Howland & Aspinwall was *selected, purchased, and shipped* by them. The services, therefore, required of the petitioner under the original contract were, as regards this coal, required of Howland & Aspinwall, and not of him. He had another duty to perform, viz: to see that the coal selected, purchased and shipped by Howland & Aspinwall was of the proper kind and quality. It seems to us, therefore, that the orders requiring this service cannot be referred to the petitioner's original contract.

There can be no doubt that in making the contract with Howland & Aspinwall, the Secretary of the Navy did not mean to dispense with the services of the agents of the department for supplying coal within the United States. On the contrary, he expressly reserved out of the compensation to be paid to Howland & Aspinwall five *per centum* of the value, at the port of shipment, of the coal to be furnished by them, for the benefit of those agents. He could not require the petitioner to perform the duties pertaining to his original appointment, for they were to be performed by Howland & Aspinwall. As to these, therefore, the petitioner's powers were revoked. But he could create a new agency, with new duties, not at all conflicting with the services required of Howland & Aspinwall. This he did, and the petitioner accepted the appointment. It does not appear that anything was said on either side in regard to compensation. As the duty was different from the duty under the original contract, the new appointment cannot be regarded as carrying with it an offer of the same compensation which was allowed under the old one. Nor does it appear to us that the old appointment furnishes a just standard of compensation for the services performed under the new one. Under these circumstances, the petitioner can only claim such compensation as his services were reasonably worth. It has not been shown by the evidence that the compensation which he has already received was not just and reasonable.

We are, therefore, of the opinion that the petitioner is not entitled to relief.

IN THE SENATE OF THE UNITED STATES.

FEBRUARY 2, 1858.—Referred to the Committee on Claims.

The COURT OF CLAIMS submitted the following

REPORT.

*To the honorable the Senate and House of Representatives of the United States in Congress assembled:*

The Court of Claims respectfully presents the following documents as the report in the case of

ILLINOIS CENTRAL RAILROAD COMPANY

vs.

THE UNITED STATES.

1. The petition of the claimant.
2. Copies of documents relating to the case transmitted from the War Department, and now transmitted to House of Representatives.
3. Letter from the Secretary of War to J. A. Rockwell, esq., transmitted to House of Representatives.
4. Certified copy of survey, from the Interior Department, transmitted to House of Representatives.
5. Claimant's brief.
6. United States Solicitor's brief.
7. Opinion of the Court adverse to the claim.
8. Judge Gilchrist's dissenting opinion.
9. Other plans and surveys connected with the case, transmitted to House of Representatives in a separate envelope.

By order of the Court of Claims.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington, this 1st day of February,  
[L. s.] A. D. 1858.

SAM'L H. HUNTINGTON,  
*Chief Clerk Court of Claims.*

## UNITED STATES COURT OF CLAIMS.

THE ILLINOIS CENTRAL RAILROAD COMPANY *vs.* THE UNITED STATES.*To the honorable the Judges of the United States Court of Claims :*

The petition of the Illinois Central Railroad Company, a corporation duly established and organized under the laws of the State of Illinois, respectfully sheweth :

That during the first session of the thirty-first Congress an act was passed by the Congress of the United States, and approved on the 20th day of September, A. D. 1850, entitled "An act granting the right of way, and making a grant of land to the States of Illinois, Mississippi, and Alabama, in aid of the construction of a railroad from Chicago to Mobile," by which said act the right of way through the public lands was granted to the State of Illinois for the construction of a railroad from the southern terminus of the Illinois and Michigan Canal, to a point at or near the junction of the Ohio and Mississippi rivers, with a branch of the same to Chicago, on Lake Michigan, and another *via* the town of Galena, in said State, to Dubuque, in the State of Iowa, with the right also of taking necessary materials of earth, stones, timber, &c., for the construction thereof; with a proviso, that the right of way should not exceed one hundred feet on each side of the length thereof. And by said act a further grant was made to said State of Illinois for the purpose of aiding in making said railroad and branches, every alternate section of land, designated by even numbers, for six sections in width on each side of said road and branches; but, in case it should appear that the United States had, when the line or route of said road and branches was definitely fixed by the authority specified in said act, sold any part of any section thereby granted, or that the right of pre-emption had attached to the same, then it should be lawful for any agent or agents, to be appointed by the governor of said State, to select, subject to the approval aforesaid, from the lands of the United States most contiguous to the tier sections above specified, so much land, in alternate sections or parts of sections, as should be equal to such lands as the United States had sold, or to which the right of pre-emption had attached as aforesaid; which lands, being equal in quantity to one-half of six sections in width on each side of said road and branches, the State of Illinois should have and hold to and for the use and purpose aforesaid; with a proviso, among other things, that the lands to be so located should in no case be further than fifteen miles from the line of the road.

To all the provisions of which said act, a copy of which is hereto annexed, marked "Exhibit 1," your petitioner refers.

Your petitioners would further show that the legislature of the State of Illinois passed an act, which was approved on the 10th day of February, A. D. 1851, entitled "An act to incorporate the Illinois Central Railroad Company," whereby sundry persons therein named, and such persons as should hereafter become stockholders in the company thereby incorporated, were incorporated as a body politic and

corporate, under the name of the "Illinois Central Railroad Company." And the said corporation was thereby authorized and empowered to survey, locate, construct, complete, alter, maintain, and operate a railroad, with one or more tracks or lines of rails, from the southern terminus of the Illinois and Michigan Canal to a point at the city of Cairo, with a branch of the same at the city of Chicago, on Lake Michigan; and also a branch *via* the city of Galena to a point on the Mississippi river opposite the town of Dubuque, in the State of Iowa.

And it was also thereby enacted that said corporation should have the right of way upon, and might appropriate to its sole use and control for the purposes contemplated therein, land not exceeding two hundred feet in width through its entire length; that they might enter upon and take possession of and use all and singular any lands, streams, and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, preserving, and complete operation of said road. And that all such lands, waters, materials, and privileges belonging to the State were thereby granted to said corporation for said purposes.

And by said act it was further enacted that, for the purpose of securing the construction of said road and branches, the right of way and all the lands which might be selected along the line of said road and branches within said State, under the grant made by the government of the United States to the State of Illinois, by virtue of said act of Congress, approved on the 20th of September, 1850; and also the right of which the State of Illinois had theretofore obtained along and on the line of said railroad and branches, as theretofore located and surveyed for the use of the same, as well as the lot of land obtained by the said State in the city of Cairo, for a depot, and all the grading, embankments, excavations, surveys, materials, personal property, profiles, plats, and papers, constructed, procured, furnished, and done by or in behalf of the State of Illinois, for or on account of said road and branches; also the right of way over and through lands owned by the State were thereby ceded and granted to said corporation in the manner and on the terms and conditions specified in said act, as by reference to said act, a copy of which is hereto annexed, marked "Exhibit 2," will more fully appear, and to all the provisions of which said act your petitioner refers your honors.

And your petitioners further show that, on the 22d March, A. D. 1851, they accepted said act of incorporation, and, on the 4th day of April in said year, deposited, in pursuance of the provisions of said act, the sum of \$200,000 with the treasurer of said State, as by a reference to "Exhibit 3" and "Exhibit 4," hereto annexed, will appear.

Your petitioners farther show that another act was passed by the legislature of said State, and approved on the 28th February, 1854, entitled "An act to amend the act incorporating the Illinois Central Railroad Company," a copy of which is hereto annexed, marked "Exhibit 5," to which your petitioners refer your honors.

And on the same 24th day of March, A. D. executed to Morris Ketchum, John Moore and a deed of trust, to which and to said deed from nois to your petitioners as aforesaid, (copies of nexed, marked, respectively, "Exhibit 6" and petitioners ask leave to refer your honors.

That the survey and location of said railroad the Chicago branch in the city of Chicago, in was through a portion of section 10, in town range No. 14 east, of the third principal meridian Illinois ; and by virtue of said acts of Congress the Chicago and North Western Pacific Railroad Company became and were entitled for their said railroad through said land, the same of the United States, and to such portion of said depots of said railroad at said termination of the fee simple title to such part of said land as was on each side of said railroad as had not been sold or was not at the date of said grant specially appropriated of the United States. That a portion of said land had been reserved for military purposes, and a Fort was established on the same, but that prior to said grant had been abandoned as a military station ; a portion of said land laid out in lots and streets as an addition to the city of Chicago sold at public auction ; that a portion of the same was appropriated and set apart for a light-house, and a marine hospital and its appurtenances.

Your petitioners further show that they made to the proper departments of the government o claiming that by virtue of said act of Congress

the right of way and depot grounds aforesaid, and to the fee simple of such portion of said reservation as was not required for the said lighthouse and marine hospital and their appurtenances as aforesaid, but the said claims of your petitioners were refused, and the officers of the War Department of the United States refused to allow your petitioners to use and occupy any of said land for any purpose.

Your petitioners would further show that in the construction of their depot at Chicago it became indispensable for them to occupy a portion of said land to which they claimed they were entitled, and without which the very large expenditures to which they had been subjected would, to a very great extent, have been unavailable. And being unable to contend with the United States, and to submit to the ruinous delays attendant upon an application to Congress, they proposed to purchase the said tract of the United States through the Secretary of War, and it was mutually understood and agreed that the petitioners should pay for the same such sum as should be fixed by three disinterested persons to be selected by Lieutenant J. D. Webster, United States Engineer, then residing at Chicago. That, instead of complying with said agreement and understanding, the said Webster called upon nine individuals for an appraisal of said property, some of whom were interested in giving an inflated value to said property, and instead of giving the valuation by the joint action of the nine, or any three of them, the separate valuation of each was taken and forwarded to the Secretary of War, and the highest price fixed by any one of the nine—viz., the sum of forty five thousand dollars—was demanded for said property; but as your petitioners were under the necessity of purchasing what they regarded as their own property, and to pay such sum as was demanded of them, they paid the said sum of 45,000 dollars, and received a deed of said tract of land, a copy of which said deed is hereto annexed, marked (8.)

That when said purchase was made, that the said price of \$45,000 paid for said land exceeded the fair market value of the same, as the same would have been estimated by three fair disinterested persons, by from \$15,000 to \$20,000.

Your petitioners would further show, that by an act of Congress approved August 4, 1852, entitled "An act to grant the right of way to all rail and plank roads and macadamized turnpikes passing through the public lands belonging to the United States," it was, among other things, enacted, that the right of way shall be, and is hereby, granted to all rail or plank road or macadamized turnpike companies that are now, or that may be, chartered within ten years hereafter, over and through any of the public lands of the United States over which any rail or plank road or macadamized turnpikes are or may be authorized by an act of the legislature of the respective States in which public lands may be situated; and the said company or companies are hereby authorized to survey and mark through the said public lands to be held by them for the track of said road one hundred feet in width: "Provided, that in case where deep excavation or heavy embankment is required for the grade of such road, then a greater width may be taken by such company if necessary, not exceeding in the whole two hundred feet."



By the 3d section of said act it was also enacted, and is hereby, granted to said company or companies sites for watering places, depots, and workshops on said road or roads, so far as the places convenient fall upon the public lands: Provided, that no place shall contain over one square acre, and that no place shall be nearer to each other than ten miles along the road or roads."

Your petitioners were duly incorporated under the legislature of said State of Illinois, as is hereinbefore in accordance with the provisions of said act, have built their said railroad, and selected the sites for depots, and have transmitted to the Commissioner of the General Land Office a correct plat of the survey of said road, and have complied with the provisions of said act, in order to be entitled to the benefits conferred thereby.

Your petitioners, therefore, claim that they are entitled by law to the land withheld by the officers of the General Land Office in before stated, and that the whole sum of \$400,000 the United States should be repaid to them with interest, and that such other and further relief should be granted as to law and justice shall appertain.

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THE UNITED STATES OF AMERICA

*To all to whom these presents shall come, greeting:*

Whereas the military site of Fort Dearborn on the Dearborn reservation at Chicago, in Cook County, Illinois, has been useless for military purposes, and the premises described not being used or necessary for the service of the United States for other authorized purposes, has been sold by the United States under the sanction of the President of the United States by an "Act authorizing the sale of certain military lands," approved March 3, 1819, and "An act in addition to an act to provide for the sale of lands conveyed to the United States in certain cases, and for other purposes, passed the 26th of March, 1828, approved April 28, 1828, for the sum of \$45,000, to the Illinois Central Railroad Company, and the said sum has been paid to the United States:

Now, know ye, that the United States of America, by its Senators and Representatives in Congress assembled, have given and granted, and do hereby give and grant unto the Illinois Central Railroad Company a portion of the military site or reservation of Fort Dearborn as follows, that is to say:

First. On the south by the southern boundary line designated on the map hereto annexed as lying between the sections "1," "6,"

Second. On the west by a line commencing at a point marked "1" on the said map in the said southern boundary, distant two hundred and fifty feet eastwardly from the eastern line of Michigan avenue, and running thence northward, and parallel to said Michigan avenue, to the piers in Chicago river forming the harbor of said city, at a point marked "2" on said map.

Third. On the north by a line running with said piers from the termination of the line last above described, at the said point marked "2," eastwardly to low water mark of Lake Michigan; subject, however, to the right of the city of Chicago to make an excavation for improving the navigation of Chicago river, granted by an "Act to authorize the mayor and common council of Chicago, Illinois, to excavate a portion of the public reservation at that place, with a view to the improvement of Chicago river," approved July 21, 1852, without any claim for indemnity or reimbursement of any part of the same above mentioned, in consequence of such excavation, if made.

Fourth. On the east by low water mark of Lake Michigan, together with all the accretions made or to be made by said lake and river in front of the land hereby conveyed; and all other rights and privileges appertaining to the United States as owners of said land.

To have and to hold the hereinbefore described lot or parcel of land, with the appurtenances, unto the said Illinois Central Railroad Company, and the successors and assigns of said company, its and their proper use, forever.

In testimony whereof, the Hon. Charles M. Conrad, Secretary of War, hath hereunto set his hand and the seal of the War Department, this fourteenth day of October, in the year of our Lord one thousand eight hundred and fifty-two.

C. M. CONRAD,  
*Secretary of War.*

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UNITED STATES COURT OF CLAIMS.

ILLINOIS CENTRAL RAILROAD COMPANY }  
vs } *Brief.*  
THE UNITED STATES.

I.—The plaintiffs are entitled to the vacant land in section 10, at Chicago, the same being on the line of their road as located, and being an even numbered section.

1. By the 1st section of the act of Congress, approved September 20, 1850, (9 Stat., 466,) it is provided: "That the right of way through the public lands be, and the same is hereby, granted to the State of Illinois, for the construction of a railroad, &c., with the right also to take necessary materials of earth, stones, timber, &c., for the construction thereof; provided the right of way shall not exceed one hundred feet on each side of the length thereof, and a copy of the survey of said road and branches, made under the direction of the

legislature, shall be forwarded to the local land offices, respectively, and to the General Land Office, at Washington city, within ninety days after the completion of the same."

The terms of the proviso were strictly complied with.

2. By the 2d section of said act it is enacted: "That there be, and is hereby, granted to the State of Illinois, for the purpose of aiding in making the railroad and branches aforesaid, every alternate section of land designated by even numbers, for six sections in width on each side of said road and branches," &c.

3. To the second section there is a proviso, "that any and all lands reserved to the United States by the act entitled 'An act to grant a quantity of land to the State of Illinois, for the purpose of aiding in opening a canal to connect the waters of the Illinois river with those of Lake Michigan,' approved March 2, 1827, be, and the same are hereby, reserved to the United States from the operation of this act."

4. The land in question was granted *in positive terms*; and if the express words of the grant are denied their plain effect and meaning, it must be from some construction given to them arising either from the act itself, or the subject-matter of the grant.

5. There is nothing in the language of the act giving any restriction to these general words, so far as relates to the land in question.

6. There is an express exception of the canal lands, which have been raised from \$1 25 to \$2 50 per acre. This shows that, without this express exception, these would also have been included.

7. This proviso and all other parts of the act show that it was not the intention to confine the grant to lands subject to entry at \$1 25 per acre.

8. There is nothing in the nature or subject-matter of the grant limiting or controlling the general language; and—

1. The purpose was to aid the building a railroad through the entire length of the State—the longest railroad, with its branches, in the United States or any other country—over 700 miles in length; and the object was not, and could not be, to grant merely the lands of inferior value, and reserve any because they were more valuable.

2. The grant was one highly beneficial to the grantees themselves. Of all the land swithin six miles of the road the alternate sections were doubled in price—\$2 50 instead of \$1 25 per acre; most of these lands had been in market for twenty or thirty years, and not saleable or valuable, and, if not granted, would have been embraced under the graduation act, which reduced them to 12½ cents per acre. These lands have *all* been sold and the money paid into the treasury, so that more than four-fold—probably more than six-fold—the amount of money has been received from the alternate sections owned by the United States than would have been received from the whole if the grant had not been made. But, in addition to this, by the 4th section of the act (9 Stat., 467) it is provided that "the said railroad and branches shall be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States;" and by the 6th section, "that the United States mail shall at all times be

transported on the said railroad, under the direction of the Post Office Department, at such price as Congress may by law direct."

3. The property in question was indispensable for the railroad company, for the tracks of the road and for the depot at Chicago. It has been used solely for that purpose, and the expenditures of the company on that property and other land adjoining, purchased by the company, in buildings, tracks, &c., at Chicago, amount to near a million of dollars.

The land was necessary—indispensable for the use of the road, and was wrongfully and illegally withheld.

In the absence of express terms of grant, the *construction* of the grant, from its purpose and intention, would have included it. Certainly where there are express terms granting it, there is no argument or construction that can take it away.

9. The argument urged by the United States that the property in question had been formerly a military reservation, does not prevent the taking effect of this grant.

1. The grant to the railroad company makes no exception of this property, and the whole force of the argument of the United States against the including, by general words in the grant, this property proceeds on the ground that it could not have been intended by Congress to transfer a fort or other property *actually* occupied for military purposes. It proceeds upon no technical ground of the necessity of a formal restoration of the land by the War Department, and a final abandonment of it for military purpose. *If the property was not actually needed or used for military purposes*, the whole force of the argument is taken away. The testimony in this case, and the facts as shown in the case of *Wilcox vs. Jackson*, and of *city of Chicago vs. The United States*, show that it was actually abandoned as a fort before 1839.

2. It was *formally abandoned* as a fort by the War Department in 1839. They at that time determined to sell the entire reservation, except so much as might be "necessary to retain for the use of the light-house." The sale was made under the direction of Matthew Birchard, acting under the orders of the Secretary of War. The instructions to Birchard and his report to the Secretary of War are among the papers furnished by the department. The property was laid out as an addition to the city of Chicago, and called "Fort Dearborn addition to Chicago." The patents from the United States to the purchasers of the property, as shown by the printed form among the papers on file in this case from the War Department, were signed by the Secretary of War and the President, and commenced as follows: "The United States of America to all to whom these presents shall come, greeting: Whereas the military site of Fort Dearborn, belonging to the United States, situate upon the southwest fractional quarter of section ten, in township thirty-nine north, of range fourteen east, of the third principal meridian, in the State of Illinois, having '*become useless for military purposes*,' the Secretary of War, under the direction of the President of the United States, appointed and authorized Matthew Birchard, solicitor of the General Land Office, his agent

to sell the same in town lots, according to the 3d March, 1819, entitled 'An act authorizing sites;' and said agent having caused said survey plat thereof," &c.

Sales were made to various parties of the lot amounting, as appears by the report of Mr. . . . All these papers, together with the manuscript furnished to the Court by the War Department, that this property was, in 1839, *formally and military post.*

2. In the very deed of the land to the Illinois Company, there is a recital of the fact of an . . . it is not necessary for public use, viz: "When Fort Dearborn, commonly known as the De Chicago, in Cook county, Illinois, has been u poses, and the part thereof hereinafter descri necessary for the site of a fort, or for any oth has been sold by the Secretary of War," &c.

3. The decision of Judge McLean in the R is in point. The United States *vs.* The Rail per McLean, J.: "Was Rock Island a milita the alleged trespass was committed? That it tary purposes in 1825 is clear. The Secretary the President and by his authority, reserved it on the books of the land offices at Edwardsvil was occupied as such until the year 1836, whe a military post; the troops were withdrawn, wards, the building was sold."

"The abandonment of Rock Island as a m public purposes, was as complete as its reserv the public authorities by whom it was selected

"Under the circumstances stated Rock Islar as a military reserve. The possession of it w right of government released through the sam was appropriated, and no act has been done which a new appropriation of the ground for r purposes is shown, or can be presumed. The by the government. The sale of the reserve w sumed, because there was no power to sell b under the act of 1819. That the suspension respect influenced by a desire to retain Rock purpose, appears by the subsequent action of t Not only was the abandonment in this case as effort was subsequently made to restore it to i military reservation.

4. The practice of the government has been claim now made in cases less clear and less me

A series of acts of Congress were passed, co tlers at Green Bay their claims for land as set ditions.—(See acts 11th May, 1820, ch. 85; act 10, &c.)

By the third section of the act of 1823, (3 Stat., 724,) it is provided "That patents shall and they are hereby directed to be issued, in the mode pointed out by law in other cases, by persons whose claims to lands, town or village lots, have been regularly filed with the commissioners appointed by an act entitled 'An act to revise the powers of the commissioners for ascertaining and deciding on claims to land in the district of Detroit, and settling the claims to land at Green Bay and Prairie du Chien, in the Territory of Michigan,' passed on the 11th of May, 1820, and whose claims are contained in the report transmitted to the Secretary of the Treasury, and which have been reported favorably on by said commissioners, and such persons are hereby confirmed in their claims, agreeably to any surveys heretofore made, or the lines and boundaries established by the claimants respectively: *Provided*, That such confirmations shall only amount to a relinquishment forever on the part of the United States, and that not more than six hundred and forty acres shall be confirmed by virtue of any one claim, nor shall more be confirmed in any case than the quantity claimed; nor shall any claim extend in width more than forty, nor in depth more than eighty, arpens; *nor to land heretofore and now reserved by the United States for public purposes.*"

Under this third section the claim of James Portier was entitled to confirmation, except that it included land which at the time was a part of the Fort Armstrong reservation at Green Bay, and all land "reserved for public purposes" was expressly excepted. Mr. Spencer, however, Secretary of War, on the 9th of February, 1842, expressly reported the lot as "no longer necessary for military purposes," and therefore "the confirmatory act of 1823 was held to be fully operative upon the grant in this case under the acts of 1820 and 1823, and it was accordingly carried into the patent." That was the opinion of the Secretary of War, to which effect was given by the act of the Commissioner of the Land Office, under the supervision of the Secretary of the Treasury, and confirmed by a patent issued by the President; thus deciding that, although there was an express exception in the act of Congress of "lands reserved for public purposes," and these lands were, at the time of the original possession of the act of the commissioners and the act of Congress, so reserved, yet, as the Secretary of War subsequently declared this portion of the land "no longer necessary for military purposes" the claim was confirmed and the patent issued.

In that case the act was a gratuity by Congress; in the present case a grant for valuable consideration. In that case there was an express reservation; in this none whatever.

II.—The grant of the right of way by the first section of the act was clear and explicit.

1. The exception in relation to the canal lands was only to the grant of the lands, and did not include the right of way. The same provision in other grants, as to the \$2 50 lands, is merely to prevent one company claiming the right to the lands benefitted and raised in price by another improvement. The construction of the road might be wholly prevented if this were so, by the very act which purports to give the right.

2. There is also an exception as to lands claimed by the State. Can it be doubted that the right of way was granted through such lands?

3. The first section, granting the right of way from the second, granting the land; the grant without restriction, limitation, or reserve.

4. If the right of way were not granted, the purpose of the grant might be defeated. They were to commence the road at the termination of the canal; and yet, although the right of way is claimed, as is claimed, pass through the land States on the borders of the canal itself. They required to form a connexion with Lake Michigan; they are to be prevented from passing over the land States to do so. Therefore, a grant made to the road in the world, and the right of way expressly given might so operate that they could all under the terms of the grant.

5. By the act of Congress of August 4, 1852, given to railroads, &c., through the public land with this proviso, "that none of the foregoing shall apply to or authorize any rights in any States other than such as are held for private estate as are unsurveyed and not held for public improvement thereon."

Whatever may be the effect of this proviso, the such proviso in the act for aiding this road, should not mean to interpose any such limitation, and proviso, no such limitation would exist.

III.—The effect of the act of August 4, 1852: See act of 1st session 32d Congress, ch. 80, 10 See Opinion of Judge McLean in the Rock Island case. The first section provides for the right of way and width.

The second section for the materials to be used on the land.

The third section for grants, "all necessary places, depots, and workshops," &c.

The proviso is: "That none of the foregoing shall apply to or authorize any rights in any States other than such as are held for private estate as are unsurveyed and not held for public use by the government thereon."

1. Were these lands "held" "for sale?" The government so regarded them, as they were a public land in 1839 by Birchard under direction of the Secretary. Every land in question was conveyed to the railroad.

2. If, as Judge McLean contends, the Secretary had no power of selling under the act of 1819, the money

refunded, and the property conveyed be regarded as held by the railroad company under their grant of September 20, 1850.

3. They were "not held for public use by erection or improvements thereon." They had been abandoned for military purposes before 1839, and other portions of the tract are occupied by a light-house and marine hospital; but the land now in question had not been occupied in any such manner, as is conclusively shown by the very deed in question.—(See the deed.)

IV.—The State of Illinois, under its right of eminent domain, authorized the appropriation of this land for track of the road and for depot purposes.

The third section of the act of Illinois, approved February 10, 1851, (p. 9 of Pamphlet,) provides, "that the said corporation shall have right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use all and singular *any lands*, streams and materials of every kind, *for the location of depots and stopping stages*, for the purpose of constructing bridges, draws, embankments, excavations, station grounds, spoil banks, turn outs, engine houses, shops, and other buildings necessary for the construction, completing, altering, maintaining, pursuing, and complete operation of said road," &c.

1. This power of laying out roads through the lands of the United States, and appropriating the land of the United States to that purpose, has been exercised in all the new States in hundreds of instances from the very origin of the government, both by the acts of the legislature and the local authorities of the counties and towns, and the only compensation received by the government has been the benefit derived by them as great land holders.

2. Although the general government, in the sale of their lands, never reserve those highways, they have universally been regarded as legal highways; and no one can contend, or ever has contended, that because a grantee of the government, he could shut up such highway.

3. The two important powers under the right of eminent domain in the State are *taxation* and the condemnation of property for roads and other public uses. They are somewhat similar; but the latter, in relation to the property of the United States, is far more certain and impugn the right of eminent domain in the States.

lating to taxing the lands of the United States, rather sustain than The legislation of Congress and the compact with the States in unquestionable.

Ordinance of 1787, art. 4., 1 Stat., 52, note.

Act establishing Illinois Territory, 2 Stat., 515, sec. 2; act to form the State government by Illinois, April 18, 1818, 3 Stat., 430, sec. 4.

McCulloch vs. Maryland, 4 Wheat., 316, 436, marg. note:

"This principle does not extend to a tax paid by the real property of the Bank of the United States, in common with the other real property in a particular State."

United States vs. Bevens, 3 Wheat. Rep., 386—per Marshall, Ch. J.:

"What then is the extent of jurisdiction which a State possesses?"



"We answer without hesitation, the jurisdiction is co-extensive with its territory—co-extensive with its legislative place described is unquestionably within the Massachusetts. It is then within the jurisdiction unless that jurisdiction has been ceded to the United States."

*Weston et al. vs. city of Charleston*, 2 Peter

"A tax imposed by law of any State of the authority of such a law, on stock issued in the United States, is unconstitutional."

"It is not the want of original power in a State to prohibit loans to a foreign government or to prevent a State legislature from direct opposition to those of the States. The restraint is imposed by our Constitution. The people have conferred the power of borrowing money on the government; and, by making that government supreme in the exercise of that power from the States. The grant of the power and declaration of a declaration that no such restraining or controlling power be exercised."—(Per Marsh. Ch. J., p. 468.)

*Osborne vs. United States Bank*, 9 Wheat.,

"A State cannot tax a bank of the United States on the part of its agents and officers to enforce a tax against the property of the bank, may be referred to the circuit court."

Per Marshall, Ch. J., p. 867:

"It is true that the property of the contract is the property of other citizens, and so may the local property."

*Dobbins vs. Commissioners of Erie county*, 1

"A captain of the United States revenue cut in Pennsylvania, was rated and assessed for compensation of the United States, for his office. Held that he be rated and assessed for his office under the United States rates and taxes." Marg. note. (See the case.)

*Carroll vs. Safford*, How., 441:

"Where the purchaser of land from the United States, and received a final certificate, it is taxable under the statutes of Michigan, although a patent has been issued." (Marg. note.)

*Nathan vs. Louisiana*, 8 Howard, 73:

"A tax imposed by a State upon all money or property is not void for repugnance to the constitutional power to regulate commerce."—(Marg. note.)

Per McLean, J., in op. of court, p. 82:

"The taxing power of a State is one of its attributes, and where there has been no compact with the United States, or a cession of jurisdiction for the purposes specified in the compact, the power reaches all the property and business within the State, not properly denominated the means of the general revenue as laid down by this court, it may be exercised by the State." \* \* \* "But State power does not reach property not taxable. Whatever exists within its territorial jurisdiction is taxable."

property, real or personal, with the exceptions stated, is subject to its laws; and also the numberless enterprises in which its citizens may be engaged. These are subjects of State legislation and State taxation, and there is no federal power under the Constitution which can impair the exercise of that sovereignty."

*Mills et al. vs. St. Clair county et al.*, 8 How. 569.—Per Catron, J., op. of ct. 585:

"To the width of needful roads and ferry landings property can undoubtedly be taken for the purposes of such easements, and necessarily the State authorities must decide (as a general rule) how much land the public convenience requires."

*Philadelphia and Wilmington R. R. Co. vs. Maryland*, 10 How., 377, marg. note:)

"This court holds, as it has on several other occasions held, that the taxing power of a State should never be presumed to be relinquished, unless the intention is declared in clear and unambiguous terms."—(See per Taney, Ch. J., p. 393.)

*Briscoe vs. The Bk. of the Commonwealth of Ky.*, 11 Peters, 258, marg. note:

"A uniform course of action, involving the right to the exercise of an important power by the State government for half a century, and this almost without question, is no unsatisfactory evidence that the power is rightfully exercised."—(McLean, J., op. of ct., 318.)

*City of New York vs. Miln*, 11 Peters, 103, marg. note:

"A State has the same undeniable and unlimited jurisdiction over all persons and things within its territorial limits as any foreign nation, when that jurisdiction is not surrendered or restrained by the Constitution of the United States."

Barbour, J., op. of court, p. 139:

"We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdiction on all persons and things within its territorial limits as any foreign nation, when that jurisdiction is not surrendered or restrained by the Constitution of the United States.

"That by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness and prosperity of its people, and to provide for its general welfare by any and every act of legislation which it may deem to be conducive to these ends, when the power over the particular subject, or the manner of its exercise, is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may perhaps more properly be called *internal police*, are not thus surrendered or restrained; and that consequently, in relation to those, the authority of a State is complete, unqualified and exclusive."—(See opinion.)

*The West River Bridge Co. vs. Ditt et al.*, 6 Howard 532.—Per Daniel, J., op. of ct., p. 532:

"This power, denominated the *eminent domain* of the State, is, as its name imports, paramount to all private rights vested under the government; and these last are, by necessary implication, held in sub-

ordination to this power, and must yield in every exercise.

"The Constitution of the United States, all sovereign States of this Union, and proclaimed to be the supreme law for their government, cannot be brought to conflict with this attribute. There is no express delegation of it by the Constitution. It is an incredible fatuity in the States to ascribe to and relinquish the power of self-government and self-protection."

*United States vs. Chicago*, 7 How. 185, (see *bury, J., op. of ct., p. 194* :

"It is not questioned that land within a State is not the property of the United States as a new proprietor, and not reserved for any special purpose, may be liable to condemnation in the same ways, like the land of other proprietors, under the same domain."—(See precise points decided.)

*Commonwealth vs. Torey*, sup. ct. of Penn., 81 Pa. Jurisprudence; 1 Wharton's Dig., 279, 280, 60.

"The jurisdiction over lands purchased by the United States within the limits of a State remains in the State. The title of the State be given according to the 8th sec. of the Constitution.

"Therefore, where land had been conveyed to the late proprietary of Penn., without any cess, and was sold by order of the President at public auction by a person not licensed by the governor, according to the act of the State, the proceeding was held to be illegal, and the penalty imposed by the act."

In the following cases the Supreme Court was of the opinion that the judgment below was affirmed :

*The United States vs. The Inhabitants of Portland*, Maine district, May term, 1845; *Supreme Court vs. The United States*, December term, 1845.—No. 123.

*Extracts from statement of facts and*

"The moneys in the schedule specified were paid for taxes assessed by the city of Portland and Falmouth, owned by the United States, situated on said land and wharf. The building upon said land and wharf was erected by the United States for a custom-house within and for the use of Portland and Falmouth, and has always been used for that purpose and no other.

"The tax for 1842 was paid by the collector of Portland and Falmouth, under protest, by direct payment to the Department. A copy of said protest is annexed to the residue of said taxes was paid without protest or assessment or payment of the same; but none of the same was paid until after warrants for the collection thereof had been issued by the collector, as before stated; and no assent was

ment, other than such as might be inferred from the fact of payment, under the circumstances before stated.

"The land on which said building stands, and the wharf connected therewith, are within the legislative jurisdiction of the State of Maine, and have always been so, not having been purchased by the United States with the consent of the legislature of the State within which the same are situated.

"This cause came up for hearing upon a statement of facts agreed by the parties, whereupon the following questions occurred:

"1st. Whether the custom-house building, land, and wharf, owned and occupied by the United States in the manner specified in said statement, were legally liable to taxation?

"2d. Whether if said custom-house building, land, and wharf, were not then liable, the plaintiffs are entitled to recover in this action from the defendants the whole amount of moneys paid by the plaintiffs as taxes, as appears by schedule A, annexed to said statement?

"3d. Whether the plaintiffs are entitled to recover in this action from the defendants any portion, and what portion of the moneys by the plaintiffs paid as taxes as aforesaid?

"4th. Whether if said property was not liable to taxation, and the plaintiffs could otherwise have a right to recover back the moneys so paid, any part of said claim is barred by the operation of the statutes of the State of Maine for the limitation of personal actions?

"Judges divided in opinion, and, on motion of United States district attorney, division ordered to be certified."

ISAAC ROACH, treasurer of the  
Mint of the United States of  
America, plaintiff in error,  
*vs.*

THE COUNTY OF PHILADELPHIA.

Appeal from judgment of Supreme  
Court of Pennsylvania that the  
mint can be taxed.



*Extract from special verdict.*

"These taxes have been assessed upon a certain marble building and lot of ground upon which the same is erected, situate in Chestnut street, between 13th and Broad streets, in the city of Philadelphia, being 150 feet on Chestnut street, and extending 250 feet on Juniper street to Olive street. The house and lot aforesaid is the property of the United States of America, and the same has been erected and used by the United States from the time of its completion, under the Constitution and laws of the United States, as a mint for coining money, regulating the value thereof, and of foreign coin, and for fixing the standards of weights and measures, and is now used for that purpose. And the question is, whether the estate belonging as aforesaid is subject to the assessment and payment of taxes as aforesaid?

"\$930 awarded by jury—\$12 costs."

J. Bonaparte *vs.* Camden and Amboy Railroad Company, 1 Ba'dwin Rep., 226.—Per Baldwin, J., p. 226:

"It is not intended to lay down the broad proposition that it is indispensable that the law should contain a provision for compensa-

tion, or prescribe the mode of making it. Tl on this subject, yet, *if compensation is actual* if the legislature should, by a subsequent law the law would be valid."

Harris *vs.* Thompson, 9 Barb. Sup. Ct. Rep

"It belongs to the sovereign power to determine expediency of appropriating private property the courts have no power to review the determination

The United States *vs.* Rock Island Bridge Co McLean.

V. The three preceding grounds for relief selves severally independent and sufficient, the construction claimed for the grant of the 2

1st. They show, that from the nature of the acts of Congress, the decisions of the courts, government, the manifest intention, as well as of Congress in the grant, included the property

2d. That the only limitation or restriction is in relation to property required and used by the powers pertaining to the government of the Constitution, such as the mint, forts houses, &c.

Objections of the Solicitor for the United States

"1st. There is no evidence that the land is at or terminus of the road, as surveyed under the act in pursuance of the act of 20th September, 18

Ans. This appears from the map furnished the Office giving a copy of the survey and located filed in that office, which shows distinctly that it is on the line and at the terminus of the railroad, and acknowledged to be so in the correspondence of War and of the Interior in their letters

2d. The objection that the petitioner is estopped by the title acquired from the United States

The question simply is, whether the grantee is disputing the title of his grantor. No such doctrine. If the grantor could never show fraud or want of title, he could not even bring a suit on the deed against the party making the covenants.

If the grantee, accepting a deed and taking possession, is estopped from disputing the validity of the title between the grantor and himself, volumes of deed law, treatises as to the covenant in deeds, fraud &c., are wholly useless, and have been entirely

The cases cited from the New York reports are not. The principle of those cases is different, and applicable to the law.—(Blight's lessee *et al.* *vs.* Rochester,

3d. "But for the purposes of this case, it is immaterial whether the title was good or not. The government had the title, and the claimants got this, and the

was worth, as evinced by the best evidence—their own act and present admission—all the money they paid.”

This argument is manifestly unsound. It is this: That, assuming a party to be in possession of property without any legal title whatever, or any *right* to the possession, such party may, by deed, sell and convey the property; and if, on trial, it appears that he had no title, instead of returning the purchase money, he may claim to be compensated for having delivered up the possession, to which he had no right, to the owner of the property, who was before entitled to it; and, because the withholding by the wrong doer from the rightful owner of property the possession to which such owner was entitled would be of greater damage than the value of the property, therefore the real owner of the property is bound to pay to the wrong doer the full amount of the purchase money.

If the title to the property in question was not vested in the Illinois Central Railroad Company according to law, of course they have no case; but if it was so vested, and was their property, it of course follows that if the possession was *wrongfully* withheld, and is transferred to the company by the party holding it wrongfully, he is surely entitled to no compensation for so doing.

The fact that the government of the United States is a party cannot certainly make such a principle as this either law or justice, which no one, as between individuals, ever supposed to be either.

It is objected that the case of *Wilcox vs. Jackson* (13 Pet., 513) conflicts with the construction claimed in this case, and that the court said: “But we go further, and say, that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law, or proclamation, or sale shall be construed to embrace it or operate upon it, although no reservation were made of it.”

The question arising and decided in the case of *Wilcox vs. Jackson* is entirely different from that in this case. Beaubien, the grantor of McConnell, the real party in that case, claimed to hold the property under the pre-emption laws of the United States, in which is the following provision: “That no entry or sale of any land shall be made under the provisions of the act which shall have been reserved for the use of the United States or either of the several States, or which is reserved from sale by act of Congress or by order of the President, or which may have been appropriated for any purpose whatsoever.” This is quoted and made the ground of decision of the case.—(13 Pet., 511.) That case clearly came within the provisions of the pre-emption laws. It further appears, from the opinion of the court, (13 Pet., 509,) that “it was again occupied by the troops of the government in June, 1832, under command of an officer of the army of the United States. It has been occupied by the troops, and was generally known at Chicago to be so occupied from that time up to the commencement of the suit, and was at the time of the trial still used for that purpose.”

Both the *law* and the *facts* in these two cases are, therefore, entirely different. If, however, the utmost force and effect were to be given to this *obiter dictum* of the judge, no one can understand the court to say

that Congress cannot by law grant this or a that when any such law has been passed by long settled principles of the construction of applied to ascertain the meaning of the law.

Judge McLean, in the Rock Island bridge such construction to this decision.

5. The Solicitor also relies upon the case Chicago, (7 How., 193.)

There was no point decided in that case in ing with the claim now made by the petitioners were expressly limited to the then questions up divided. After discussing the question of the condemn land of the United States, he says: this proposition being open to some debate, i nor is it decided here, because not necessary case."

The principal ground of the decision was, the roads in Fort Dearborn did not exist, because i from the charter by the act of the legislature there being a provision expressly "excepting quarter of section ten, occupied as a military p become private property," &c.

It is, however, expressly stated by Judge W "It is not questioned that land within a State States as a mere proprietor, and not reserved special purpose, may be liable to condemnation like the land of other proprietors under the rig

The Solicitor objects, in relation to the poin of this property by the legislature, that *no con* the United States.

1. The *provision* in the amendment to the ( vate property shall not be taken for public use tion," certainly was never designed to have a the United States, in the few cases which migl might be made under the authority of a State United States.

2. If it is claimed that the *principle* of this tion should be applied to the United States, n or can be cited where any such compensation h contrary, from the origin of the government to the new States, the land of the United States to roads. In all those States roads have be hundreds, many thousands of tracts—no comp There was no distinction as to good or bad, ch

3. The government of the United States, r acquiescence in the exercise of this right, a claim of compensation, but by express legis and sanctioned this right. They provided, c new States into the Union, for the appropriat the proceeds of the sales of the public lands i of roads within the State, under the direction State, and that two per cent. fund has been so

shows that Congress considered not only that they had an ample compensation in the improvement of their land for the small amount taken, but that this two per cent. should be an additional compensation. Every one knows, that as the United States were subjected to no taxes in the State for the building of roads, and were expressly exempted by compact, that the benefit to the United States, as a great landholder, by building the roads would be twenty fold—a hundred fold—for any damage from the taking the land.

As the State cannot *assess* the *benefits*, and oblige the United States to pay in that form for the advantage of laying out roads, as in the case of individuals, there is reason why they should not be allowed compensation.

It may be safely said, that of the roads of any considerable length laid out in the new States for more than sixty years past, if not every one, certainly ninety-nine out of every hundred were laid out and opened over lands of the United States, under the authority of the State. It does not follow that the government would in every case gain by the laying out of the road, but, on the whole they were most amply compensated, and it is rather late in the day to adopt any new or more narrow or restricted mode of ascertaining that compensation.

4. The decision of Judge McLean on this question is precisely in point. This very point was distinctly made and argued by the Attorney General in the Rock Island Bridge case. The following is an extract from his supplemental brief:

Page 12: "The power of eminent domain does not authorize the State to take the property of a superior power, held for constitutional and authorized purposes. Military sites are necessary for the uses of the government, whose laws when made in pursuance of the Constitution, are supreme, and such sites are, therefore, not liable to any interference of the State government."

"2. The State can take private property only for State uses, and upon making just compensation. Illinois has not taken the property in question for public or State purposes, or for any purpose whatever; nor has she made, nor does she propose to make, any compensation for the property in question;" &c., &c., &c.

6. The objections stated in relation to the act of 20th Sept. 1850, are wholly unfounded. The idea that when part of a section of land had been sold, &c., that the State were either required or authorized to omit to take the other and unsold part, and to select other lands, is wholly unsustained by the act, and contrary to the uniform construction given by all the officers of the United States in all similar grants. The grant is of *all* unsold lands belonging to the government in the even numbered sections within six miles of the line of the railroad, and it is only to supply the deficiency arising from the sale of a *part* of the land in the even numbered sections within six miles, that the act authorized a selection from land outside of it. The *repeated* and *uniform* decisions of the Supreme Court of the United States are, that a grant of land by Congress by words, *in presenti*, conveys a perfect title without the necessity of any patent or writing of any kind, and the act of Congress, *proprio vigore*, vests the title in the grantee.

JOHN A. ROCKWELL,  
*Of Counsel for Petitioner.*



## IN THE COURT OF CLAIMS.

## ON THE PETITION OF THE ILLINOIS CENTRAL RAILROAD COMPANY.

*Brief of the Solicitor of the United States.*

This is a claim for \$45,000, paid the United States for a conveyance by deed made by the Secretary of War, dated October 14, 1852, of a part of the Fort Dearborn military reservation, situated in the city of Chicago. It is contended that the company was entitled to the land in virtue of two previous legislative grants; one by act, dated September 20, 1850, (9 Stat., p. 466,) entitled "An act granting the right of way and making a grant of land to the States of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile," and the other by act of August 4, 1852, entitled "An act to grant the right of way to all rail and plank roads, and macadamized turnpikes, passing through the public lands belonging to the United States."—(10 Stat., p. 28.)

It is alleged that the company made claim, in due form and to the proper public officer, for the land in virtue of one of these grants, but it was rejected; and as the land was necessary to them, and the delay attendant on procuring it from Congress could not be submitted to, they proposed to purchase, which was acceded to, and the deed given and accepted, and possession taken.

There is no evidence that the land in question is on the line or terminus of the road, as surveyed under the authority of Illinois, in pursuance of the act of 20th September, 1850.

There is no proof that any such claim was ever heretofore made. If made, however, it was abandoned, and the deed accepted and possession taken under it, which estops them from denying the validity of the title so acquired.—(Brown *vs.* Hinman, 14 I. R., 292; 7 ib., 157; 6 ib., 34; 1 Caine, 444.)

But, for the purposes of this case, it is immaterial whether the title was good or not. The government had the possession with claim of title, and the claimants got this; and the advantage of it to them was worth—as evinced by the best evidence, their own act and present admission—all the money they paid.

It would be easy to show, if the question were open, that the grant of the right of way through the public lands, and the grant of alternate sections for the purpose of constructing railroads, and also for sites for watering-places and depots on public lands, made by the acts referred to, did not apply to those parcels of ground which had been set apart or appropriated by proper authority to the special use of any department or branch of public service. The term "public lands" does not apply to all land owned by the United States. No one would include the grounds of the Capitol or those about the President's mansion, at the Washington arsenal and navy yard, or other public grounds and squares in this city, in a provision respecting public lands; and yet in one sense they are public lands, being the property of the government or the public. The term applies only to lands

subject to sale and entry, or which will be subject to sale and entry at the land offices, and not to those tracts or parcels which have been purchased or reserved for public use, in connexion with forts, arsenals, magazines, hospitals, or other public buildings.

And it is remarkable that this principle has already been applied by the Supreme Court of the United States to save this property from other speculators, who, in like manner, attempted to grasp it by bringing themselves within the language of a law relating to the public lands. The case referred to is that of *Wilcox vs. Jackson*, (13 Peters, 513.) The land was entered under the pre-emption laws by one Beaubien, an army contractor, who had been suffered to reside on it, and who had assigned his claim to Murray McConnell. McConnell claimed that the entry was legalized by the fourth section of act of 26th of June, 1834, authorizing the sale of all public lands in that district, without any reservation in the law which would embrace and save the Fort Dearborn reservation. The Supreme Court say: "In the first place, we remark that we do not consider this law as applying at all to the case." "But we go further, and say, that whensoever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale would be construed to embrace it or to operate upon it, although no reservation were made of it." The Court then proceeded to consider the results to which a contrary doctrine would lead in the appropriation of the fort and public buildings, which had cost hundreds of thousands, by a person who had paid the government \$94 61, and concluded by saying that a principle which leads to such startling consequences cannot be a sound one.

In the case of the *United States vs. Chicago*, (7 Howard, 193,) the Court, referring to the case of *Wilcox vs. Jackson*, say: "In that case, this Court decided that this was a legal appropriation of that quarter section of land to a public purpose, and exempted it from the rules as to the mass of public lands and their usual liabilities."

The Court, in the language already quoted, say distinctly that no saving (although such exceptions are very often inserted out of abundant caution) is required in an act making grants of public land, to protect lands previously appropriated from the operation of such acts. Such exceptions are entirely unnecessary, and, therefore, they proceeded to say that the Fort Dearborn reservation is exactly on the footing with the grants to individuals and to the State of Illinois, which are expressly excepted in the act of 1834; and, therefore, the proviso of the act of August 4, 1852, p. 28, vol. x, not noted by the claimant, although it is contained in one of the acts relied on by him expressly saving from its operation any lands not subject to private entry, and those reserved where lands are not surveyed, was, like the saving in the act of 1834, and various similar provisions in other acts relating to the public lands, wholly useless.

The claimants betray a consciousness of this, and endeavor to present a case differing from McConnell's, by alleging that the Fort Dearborn reservation, or at least that part of it sought by the railroad company,

had been abandoned as a military station at the time the act of 1850 became a law.

The allegation is unsupported by proof. But if the fact was proved that the fort was no longer garrisoned, and had not been for several years, and the part sought by the railroad company not used for any public purpose, it would not help the claim.

The Court say, in the language above quoted, that when such reservations are once made, the land is severed from the mass of public lands, and is exempt from the operation of acts of the character of that of 1850, without any further reservation. This land was reserved in 1824, and it appears by the case in 13 Peters to have been in the possession of the United States and their officers down to the time of the trial of that case; and it appears by the petition here to have been in the possession of the officers of the United States, and by the plat accompanying the deed from the Secretary of War to the railroad company, that the public stable was situated on that part of the land here claimed.

It is not pretended that there was ever any formal reassignment of this property to the land department by the War Department; but it is assumed that mere non-user by the War Department of the property for a military post for some years, together with the sale by the Secretary of War, under orders of the President of a part of the reservation, under authority of the acts of 3d March, 1819, (3 Stat., p. 520,) 26th May, 1824, (4 Ib., 51,) 28th April, 1838, (4 Ib., 264,) subjected the part in question to appropriation under the general acts referred to, as if the reservation had been removed or had never existed.

Whether the acts quoted apply or not, is immaterial as effects this question. It appears by the opinion of Judge McLean, in *Rock Island Bridge* case, (6 McLean's Rep., 517,) that doubts have existed as to the operation of these acts, and whether, under them, the War Department, by direction of the President, was authorized to dispose of the sites of such forts as should become useless as forts after the date of the act of 1819; and the judge is of the opinion that the act was not prospective; but he is equally clear, that land once reserved for any public use, and set over by the Land Department to another department for such objects, does not revert to the Land Department till it is formally turned over, as was done in the case of *Fort Armstrong*.

(See the letter of the Secretary of War to the Secretary of the Treasury, then the head of the Land Department, dated 11th February, 1848, by which the site of *Fort Armstrong* "is hereby relinquished, and placed at the disposal of the department which has charge of the public lands.")

The judge thinks that lands retroceded in this way, and then advertised, become afterwards subject to private entry, and then are subject to be condemned and appropriated for the public uses, as for roads, &c., under State authority. The mere ownership of land by the general government does not exempt it from condemnation for such purposes, he decides, but he distinctly allows that a reservation unrecalled in the manner that at *Fort Armstrong* had been, would prevent the condemnation of the property under State laws. And this is declared with equal distinctness in the case of *United States vs. Chicago*, where

the question was, whether streets could be opened within the unsold reservations, when it was decided that the reservations unsold could not be touched under such authority, because, among other reasons, the government had not parted with the title, and because it had been set apart for public use, &c —(See 7 Howard, p. 194.)

This was in 1849. Judge McLean, in the opinion given last winter, in the Rock Island Bridge case, says, (p. 4 of pamphlet ed.,) "the possession of it (the Fort Dearborn reserve) for public purposes has never been abandoned;" whereas he says of the Rock Island reserve, "the possession of it was abandoned, and the right of the government released through the same authority by which it was appropriated."

The Rock Island case was an injunction brought by the United States against the construction of the bridge, on the idea that it was an obstruction to the navigation of the Upper Mississippi; and the attempt was made to interpose the Fort Armstrong reserve to maintain the injunction—Congress not having legislated, under its power, to regulate commerce so as to authorize the courts to declare the bridge a violation of any statute law on that subject.

As already seen, the Court decided that the reserve, having been abandoned, could not be made available; and the ground was then taken, that, although abandoned as a military post, it was property of the United States, not subject to be condemned for railroad purposes under laws of Illinois. This is also overruled by Judge McLean, because the reserve was abandoned, and he declares it had thereby become subject to condemnation.

It was argued that the tract here was subject to condemnation, and this opinion of Judge McLean quoted as authority, although, on the face of the opinion, the judge expressly distinguishes between the condition of the Fort Dearborn reservation and that of Fort Armstrong.

But if the land in question had ever been subject to condemnation, there was never an effort made to have it condemned by the railroad company; and no allegation is made in the petition to that effect, and no claim based on such grounds. All right of that kind must be based on the provisions of the 3d section of the charter, and that authorizes proceedings against any property for condemnation, only in the event that the owner will not voluntarily make terms which are accepted. Here terms were voluntarily offered, which were accepted. The claimant's counsel argues that no such proceedings are required with respect to property of the United States, because that point was not made against the company in the bridge case. That proceeding was to pull down a bridge already constructed, as an obstruction to navigation.

But in the case of *The United States vs. Chicago*, among other reasons for the injunction granted, the Court say, "nor was any compensation proposed or made, as in other cases, for condemning this land and damaging the buildings thereon."—(Page 195.)

What is said in the petition about the price is not true. No one of those to whom Lieutenant Webster referred the question estimated the value at less than \$30,000. Webster himself was of the opinion that it was worth \$90,000, and would have brought that sum, and perhaps

more, at the time of the sale, if the street were offered at public auction.—(See his letters.)

A proviso in the act of August 4, 1852, (10 Stat. at Large, p. 466, ch. 61,) provides that none of the foregoing provisions shall apply to lands other than such as are held for public use and such as are unsurveyed and not held for public improvements thereon."

This was not subject to private entry and sale. It had been surveyed.

It was held for public use by erection and improvement.

Nor does the act of 20th September, 1850, require that, when any part of any of the sections described shall have been sold, the railroad company shall purchase the same. Here part of a section had been sold. Now, whether the act *required* in such cases the purchase in lieu, or merely gave the liberty of doing so, was a right to elect, no doubt they have elected. At all events, there is no evidence that they elected. It remained of the 10th section. Besides, the grant was *to* the city, not *into* it, and the alternate section was *to* be sold, and, therefore, the company had no claim either in the 10th or of sections.

The 6th section of the act of 20th September, 1850, enacts "that the lands hereby granted to the State be subject to the disposal of the legislature thereof for public use, and no other."

The second section also provides that these lands shall be sold only as the work progresses, and shall be applied to the use for which they were granted, and for no other purpose whatever."

The grant of the lands and rights made by the act of 10th of February, 1851, was subject to these and other requirements of the act of 1850, and is therefore invalid.

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#### IN THE COURT OF CLAIMS AND DAMAGES

#### THE ILLINOIS CENTRAL RAILROAD COMPANY *vs.*

SCARBURGH, J., delivered the opinion of the court.

By the act of Congress approved September 12, 1850, (9 Stat. at Large, p. 466, ch. 61,) the right of way for a railroad from the southern terminus of the Illinois and Michigan canal to a point at or near the junction of the Illinois and Mississippi rivers, with a branch of the same to Chicago, was granted to the State of Illinois, with the right to take necessary materials of earth, stone, timber, &c., for the construction thereof. That act also provided that the State of Illinois, for the purpose of aiding in the construction of the main line and branches, every alternate section of land, design-

for six sections in width on each side of the road and branches, subject to certain limitations mentioned in the act, and to the reservation of any and all lands reserved to the United States by the act approved March 2, A. D. 1827.—(4 Stat. at Large, ch. 51, p. 234.)

By an act of the legislature of Illinois, approved February 10, A. D. 1851, the petitioners were created a body politic and corporate, by the name and style of the "Illinois Central Railroad Company." In pursuance of that act the governor of Illinois, by an indenture dated the 24th day of March, A. D. 1851, conveyed to the petitioners all the lands granted by the United States to that State by the act of Congress of September 20, A. D. 1850; also the lot of ground obtained by the State of Illinois within the city of Cairo for a depot; also the right of way, grading, embankments, excavations, survey, work, materials, profiles, plats, and papers described in the act of the legislature of Illinois, or in anywise appertaining to the railroad and branches.

By the act of August 4, A. D. 1852, (10 Stat. at Large, p. 28, ch. 80,) Congress granted to all railroad companies that were then or might within ten years thereafter be chartered, the right of way over and through any of the public lands of the United States, over which any railroad was or might be authorized by an act of the legislature of the respective States in which public lands may be situated, and also all necessary sites for watering places, depots, and workshops along the line of such road, so far as the places convenient for the same may fall upon the public lands, but subject to certain limitations specified in the act.

The survey and location of the branch of the Illinois Central railroad, terminating at Chicago, passed through a portion of section 10, in township 39 north, of range 14 east, of the third principal meridian, in the county of Cook, in the State of Illinois.

A portion of this section, containing 57.5 acres, was, on the 1st day of October, A. D. 1824, at the request of the Secretary of War, reserved from sale for military purposes by the Commissioner of the General Land Office, who then colored and marked it on the map as reserved from sale for those purposes.—(13 Peters' Rep., 512.) The land so reserved embraced the military post called Fort Dearborn, which was established in the year 1804, and was occasionally occupied by the troops of the United States, and for the purposes of an Indian agency, from that time till the year 1839. Also, before the 1st day of May, 1834, the United States built a light-house thereon. In the year 1839 the Secretary of War, with the approbation of the President, made sale of a portion of the reservation. By a survey then made, the whole reservation was found to contain only 53.25 acres, being 3.25 acres less than the quantity marked upon the original official plat—the quantity having been diminished, it was supposed, by abrasions caused by the action of the waters of Lake Michigan. The part sold was, before the sale, divided into lots, and designated on the plat, by the agent who made the sale, as the "Fort Dearborn addition to Chicago." The evidence before us does not show what was the precise quantity sold, but the part withheld from sale included the light-house and the buildings connected with it, and

was separated from the part sold by a bound and marked out on the plat. Since the 3d day of the United States have built a marine hospital from sale.

The survey and location of the Chicago and North Western railroad passed through the land withheld from the Secretary of War, with the approbation of a portion of it, including the line of the railroad at the price of \$45,000. This sum was paid in the United States, and the Secretary of War made the petitioners on the 14th day of October, A. D. 1850, in which the premises sold and thereby conveyed as described.

The patents granted by the United States to the land sold in 1839, respectively, contain this recital: "Whereas the military site of Fort Dearborn belonging to the United States, having 'become useless for military purposes,' &c. The instructions then given by the Secretary of War who made the sale were, to 'reserve the high ground connected with it, and such quantity of land as may be necessary to retain for the use of the light-house.'

The deed from the Secretary of War to the petitioners contains the following recital: "Whereas the military site of Fort Dearborn, known as Fort Dearborn reservation, at Chicago, Illinois, has become useless for military purpose hereinafter described not being used or necessary or for any other authorized purpose, has been sold by the Secretary of War," &c.

The Secretary of War, in making the sales, acted in pursuance of the act of Congress, entitled "An act to provide for the sale of certain military sites," approved March 3, 1847, (Stat. at L., p. 520, ch. 88;) and, in making the sales, he professed to act in pursuance of the act last mentioned, and the act entitled "An act in addition to the act entitled 'An act to provide for the sale of lands conveyed to the United States for other purposes,' passed the twenty-sixth day of April, 1846, and twenty-four," approved April 28, A. D. 1846, (Stat. at L., p. 264, ch. 41.)

The petitioners claim that, under the acts of Congress of August 20, A. D. 1850, and of August 4, A. D. 1852, they are entitled to the right of way through the portion of section 36 of township 36 north, range 10 east, of the 3d principal meridian, which was surveyed and located, and to such part of the land as was necessary for their depot at the termination of the road, and also in fee to such part of it, on each side of the road as has been sold by the United States, or was not, at the time of the sale, specially appropriated for the use of the United States, and that they allege that their just rights in the premises were injured by the United States, that they, being unable to contend with the United States, submit to the ruinous delays attendant upon an appeal to the courts, and proposed to make and did make the purchase of the land.

There is no evidence before us in relation to

tween the Secretary of War and the petitioners concerning the sale made by him to them, except to the extent already noticed.

The petitioners claim "that the whole sum of \$45,000, paid by them to the United States, should be repaid to them, with the interest thereon."

The petitioners, as we understand them, insist upon these two propositions: (1) That the land conveyed to them by the Secretary of War, at the time of the passage of the act of Congress of September 20, A. D. 1850, constituted a part of the *public lands* of the United States, and was embraced by that act; and (2) that if the land so conveyed did not at that time constitute a part of the public lands of the United States, still "the State of Illinois, under its right of eminent domain, authorized the appropriation of this land for the track of this road, and for depot purposes," by the 3d section of the act of the legislature of that State, approved February 10, A. D. 1851. We will consider these two propositions in their order.

(1.) The words "public lands," when used in an act of Congress, may, with propriety, be regarded as technical in their character. When so used, they apply only to the unappropriated lands of the United States. Hence, the Supreme Court of the United States, in the case of *Wilcox vs. Jackson*, (13 Peters' R., 498, 513,) lay it down as a general proposition, that whensoever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and that no subsequent law, or proclamation, or sale, will be construed to embrace it, or to operate upon it, although no other reservation were made of it. When so appropriated, therefore, although it is the land of the United States, it is not a part of "the public lands" of the United States.

In the case of *Wilcox vs. Jackson*, the validity of the Fort Dearborn reservation was the very matter involved in controversy. The Supreme Court held that an appropriation of land by the government is nothing more or less than setting it apart for some particular use; and that, in the case before them, the land had been appropriated by lawful authority for three several purposes: 1st, for a military post; 2d, for an Indian agency; and 3d, for the erection of a light-house.

The appropriation for the first two purposes was made by the President under the authority of acts of Congress, and for the last, directly by an act of Congress.—(10 Peters' R., 512.) But the Court considered that, where the designation of the place is left by statute to the discretion of the President, and he makes the designation, it is precisely the same thing as if it had been made in the statute itself; and, therefore, that each appropriation was of the same character. The Court also held that the precise limits of the appropriation were ascertained and determined by the Commissioner of the General Land Office in the reservation made by him in 1824.

The case of *Wilcox vs. Jackson* was commenced in February, A. D. 1836. We consider, then, that we have the authority of the Supreme Court for saying that at that time the land in question in this case did not constitute a part of "the public lands" of the United States.

The case of *Wilcox vs. Jackson*, however, not only arose, but was



finally decided before the sales made by the Secretary of War, in 1839. But the case of *United States vs. Chicago*, (7 How. R., 185,) in which the character of the title of the United States to the Fort Dearborn reservation was also involved, was commenced in April, A. D. 1847. That was an application by the United States for an injunction to restrain the city of Chicago from opening streets through the land which was withheld from sale by the Secretary of War in the year 1839. The action of the Secretary of War, as well in regard to the sales then made as to the land withheld from sale, was stated in the bill and commented upon by the Court. The Court, in considering the extent and character of the rights of the United States in the place where the new streets were proposed to be opened, expressly held, (1) that the place was where the title of the government had never been parted with after the original cession; and (2) that it was where the land *had been appropriated and legally set apart for a special public use.*—(7 How. R., 194.)

It is plain, therefore, that, according to the decision in the case of *The United States vs. Chicago*, the land in question in this case continued appropriated to a special public use up to the month of April, A. D. 1845, and for that reason was not at that time a part of the "public lands" of the United States.

The only circumstances which have since occurred are, (1) that the United States have built a marine hospital on the land withheld from sale in 1839, and (2) a portion of it has been sold by the Secretary of War to the petitioners. If we give to the first circumstance the effect given by the Supreme Court to the building of a light-house upon the same premises, we must regard it as but an appropriation thereof by Congress to another public use. Such, it seems to us, is its proper legal effect. And it would be difficult, we think, to deduce from the second circumstance the conclusion that those premises had previously become, or were thereby made, a part of the "public lands," for the Secretary of War is not authorized by law to sell "public lands."

The petitioners, however, insist that before the passage of the act of Congress of September 20, A. D. 1850, the land in question was useless for any authorized purpose, and so continued till the sale and conveyance thereof to them. But the only evidence before us tending in any degree to show these facts is, (1) the mere circumstance of the sale to the petitioners, and (2) the recital in the deed by which the conveyance was made to them.

In regard to this evidence we remark, that the conveyance to the petitioners was made after the passage of both the acts of Congress under which they claim, and, therefore, that proof that the land conveyed to them was useless for any authorized purpose at the time of the conveyance would not necessarily show that it was so before the passage of either the one or the other of those acts. How or when it became useless for any authorized purpose, or whether it had never been used or necessary for any such purpose, the evidence does not enable us to determine.

But this is not the only difficulty in regard to this evidence. If the land in question was, before the passage of either of the two acts of Congress last referred to, a part of the "public lands," the Secre-

tary of War, for that very reason had no authority over them, and consequently any act done or any admission made by him would not be admissible in evidence for any purpose against, or be obligatory upon, the United States. Such land could continue subject to the authority of the Secretary of War only so long as it remained appropriated to some special public use committed to his department. If it should be again made a part of the "public lands," it would no longer remain subject to his authority, but immediately become subject to the authority of the department which has charge of the "public lands."

But this is not all. The facts which this evidence has been adduced to prove are wholly insufficient to sustain the conclusion drawn from them by the petitioners. It seems to us that if it be conceded that the land in question was useless for any authorized purpose at the time of the passage of the act of September 10, A. D. 1850, and so continued till the conveyance made to the petitioners, it would by no means follow that it was a part of the "public lands." It was appropriated by lawful authority to a special public use, and, in our opinion, it could not be restored to its original condition as a part of the "public lands" otherwise than by the same authority. Congress alone has the power to authorize the appropriation of any part of the "public lands" to a particular public purpose; and when it is once so appropriated it cannot be diverted from that purpose but by the same authority. This is so manifestly the correct view of this subject, that it cannot be necessary to offer an argument in support of it.

We are aware that in the case of *The United States vs. The Railroad Bridge Company* (6 McLean R., 517) it was held, that where land has been reserved under the authority of an act of Congress for military purposes, but afterwards becomes useless for those purposes, and is abandoned by the Department of War, and formally placed by that department at the disposal of the department which has charge of the "public lands," the reserve falls back into the mass of those lands, and becomes subject to be sold under the general law. But if this be the true doctrine, and we do not mean here to question it, the power of the War Department must be implied from the acts of Congress under which the appropriation was made. Those acts are referred to by the Court in the case of *Wilcox vs. Jackson*, (13 Peters' R., 512.)

By the act of May 3, A. D. 1798, (1 Stat. at Large, pp. 54 and 55, ch. 37, § 1,) an appropriation was made to enable the President to erect fortifications in such places as the public safety should, in his opinion, require; and he was authorized to cause them to be erected under his direction, from time to time, as he should judge necessary. And by the act of May 30, A. D. 1809, (2 Stat. at Large, p. 547, ch. 22,) the President was authorized to erect such fortifications as might, in his opinion, be deemed necessary for the protection of the northern and western frontiers. It was under and by virtue of these statutes that the Fort Dearborn reservation was made; and the Supreme Court held that, though the designation of the place was left to the discretion of the President, it was the same thing, in effect, as if it had been named in the law itself. But inasmuch as this discretion was vested

in the President, and the power was given him to erect such fortifications as he might deem necessary, it may be the proper construction of the acts of Congress that they, by implication, confer on him the power also, when the place designated and reserved becomes no longer necessary for the purposes of the reservation, to direct its abandonment by the War Department, and its transfer by the latter to the department which has charge of the "public lands." If, however, he has this power, it is nevertheless necessary that he should exercise it before the thing which it authorizes him to do can be considered as done. If, when a state of facts exists which would authorize him, in the exercise of the discretion vested in him by law, to restore the reserve to the "public lands," it must be considered as restored, and, in fact and in law is so restored, its restoration is effected not by the act of the President done in the exercise of that discretion, but by the mere operation of the law itself. No such doctrine as this is sanctioned by the case of *The United States vs. The Railroad Bridge Company*. On the contrary, whilst in that case the power is held to be vested in the President, the act by which its exercise was evidenced was express and unequivocal. The Secretary of War, in a formal communication to the Secretary of the Treasury, said: "The site of Fort Armstrong is no longer required for military purposes, and it is, therefore, *hereby relinquished and placed at the disposal* of the department which has charge of the public lands." And Mr. Justice McLean, in delivering his opinion in that case, said: "The abandonment of Rock Island as a military post, and for all public purposes, was as complete as its reservation had been by all the public authorities by whom it was selected or used."

It seems to us, therefore, that, though it be true that before the passage of the act of September 20, A. D. 1850, the land in question had become useless for any authorized purpose, and so continued till the sale and conveyance thereof to the petitioners, yet something more was necessary to restore it to the mass of "public lands."

It will not be contended, we suppose, that the legal operation and effect of the conveyance made by the Secretary of War to the petitioners was, not to transfer the land in question to them, but to transfer it to the department which has charge of the "public lands," and thereby restore it to the mass of those lands. That conveyance was either valid or invalid. If valid, it gave to the petitioners a good title to the land conveyed. If invalid, it was a mere nullity. And though it may be true that the Secretary of War had the power to restore the land to the mass of "public lands," yet an act done by him having in contemplation and designed to accomplish a wholly different object cannot be regarded as an exercise of that power, or allowed to produce an effect which was not at all intended.

In the case of *The United States vs. The Railroad Bridge Company*, Mr. Justice McLean expresses the opinion that the act of March 3, A. D. 1819, (3 Statutes at Large, page 520, chapter 88,) only authorized the sale of such military sites as had *at that time* been found, or had *at that time* become, useless for military purposes. The executive branch of the government has, it is manifest, adopted and acted upon a different construction; for the sales of 1839, as well as that to

the petitioners, were made under the act of 1819, and in neither case had the military site become useless for military purposes before the passage of that act. Very important interests, therefore, are dependent upon the latter construction, and it ought not to be lightly disturbed. If the former be the correct construction, then the sale made to the petitioners may not be valid. But they have not urged this objection to the action of the Secretary of War. Should they do so, they might, with some plausibility claim either that their title should be confirmed, or that the purchase money should be repaid to them. They could not, however, we suppose, claim the latter unless the former was denied them; at all events, it would be a condition precedent to the repayment of the money, that they should redeliver the possession of the land to the United States. But they have not placed their claim on this ground, and, therefore, we are not called upon to consider the construction of the act of 1819.

We are of the opinion that the land conveyed by the Secretary of War to the petitioners was not embraced by either the act of September 20, A. D. 1850, or the act of August 4, A. D. 1852. It did not, at the time of the passage of either of those acts, constitute a part of the "public lands."

2. The second proposition insisted upon by the petitioners may be true, and still their claim not well founded. The question whether the right of eminent domain in the State of Illinois extended over the land in question does not arise in this case; nor does the question whether the third section of the Illinois statute of February 10, A. D. 1851, was applicable to it. That section is as follows: "The said corporation shall have right of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of, and use, all and singular, any land, streams, and materials of every kind, for the location of depots. \* \* \* \* \* All such lands, waters, materials, and privileges belonging to the State, are hereby granted to said corporation for said purposes; *but when owned or belonging to any person, company, or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporations,' approved November 5, 1849.*" \* \* \* \* \*

The only lands embraced by this act are those which belong to the State of Illinois, and those which belong to any person, company, or corporation. If, therefore, the land in question were not the land of that State, or of a person, company, or corporation, this act did not apply to it. It is not pretended by the petitioners that they have undertaken to avail themselves of the benefit of this act as against the United States; and it is plain that they could not have obtained the benefit of it, except on the terms prescribed by it. It authorizes land to be taken by the petitioners, but it expressly requires that when so taken it shall be paid for, if any damages are awarded, in the manner directed by it. The petitioners therefore, under this act could only have taken the land conveyed to them by the Secretary of War, if at all, on these terms. But they never attempted it. They chose rather

to obtain it by grant from the Secretary of War. Hence it is obvious that we are not called upon to inquire whether the Illinois act applied to this land, or whether, if it did, it was in that sense and to that extent a legitimate exercise of the right of eminent domain by the State of Illinois.

Our opinion is, that the petitioners are not entitled to relief.

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IN THE COURT OF CLAIMS.

THE ILLINOIS CENTRAL RAILROAD *vs.* THE UNITED STATES.

GILCHRIST, Chief Justice.

My opinion in this case is as follows :

The first question in the case is, whether the land out of which this controversy has arisen was a part of the "public lands" at the time of the passage of the act of Congress of September 20, 1850.

There is no doubt that the land in question, constituting part of section 10, was reserved from sale, and was legally appropriated to the use of the United States, and occupied by the government as a military post down to a comparatively recent period. It is unnecessary to state the various acts by which parts of the public lands may be reserved from sale, or the manner in which this land became so reserved. How long it continued to be a military reservation is the material point to be determined, and presents a question which it requires some examination to answer.

It appears that as long ago as the year 1839, eighteen years since, the land was considered by the War Department as being entirely useless for military purposes. On the 23d of April, 1839, Mr. Poinsett, the then Secretary of War, appointed Mr. Matthew Birchard the agent of the department "to sell the military reservation at Fort Dearborn." On the 21st day of November, 1840, Mr. Birchard made an elaborate report of his doings to the department. He had been instructed to "reserve the light-house and buildings connected with it, and such quantity of land as you may think necessary to retain for the use of the light-house, and the land so reserved will be designated on the plat, and withheld from sale." In his report he specifies the land reserved, and says they are colored blue in the official plat. He states his reason for reserving so much to be to protect the light from obstruction by private buildings, which might otherwise have been erected between it and Lake Michigan. Every preparation was made for the sale. Printed blanks were prepared, in which Birchard's name appears as the agent of the department. The recital in the deeds is as follows: "Whereas the military site of Fort Dearborn, belonging to the United States, situate upon the southwest fractional quarter of section ten, in township thirty-nine north, of range fourteen east, of the third principal meridian, in the State of Illinois, having 'become useless for military purposes,' the Secretary of War, under the direction of the President of the United States, appointed and authorized Matthew Birchard, solicitor of the General Land Office, his agent to sell and survey the same in town lots, according

to an act of Congress of the 3d of March, 1819, entitled 'An act authorizing the sale of certain military sites,' " &c.

These various facts render it perfectly clear that in the years 1839 and 1840 the Fort Dearborn reservation had become useless for military purposes. All the lots constituting part of what Mr. Birchard called "the Fort Dearborn addition to Chicago" were to be, and most of them were sold, reserving from sale only so much as, in his opinion, would be for the convenience of the light-house. It is difficult to conceive of any more conclusive evidence that the site was abandoned for military purposes than that contained in the recital in the deeds executed in 1840. In the case of *Wilcox vs. Jackson*, (13 Pet., 513,) the Court, in speaking of the Fort Dearborn reservation, say: "Now, although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties. Both military posts and Indian affairs, including agencies, belong to the War Department. Hence we consider the act of the War Department in requiring this reservation to be made, as being, in legal contemplation, the act of the President; and, consequently, that the reservation thus made was, in legal effect, a reservation made by order of the President, within the terms of the act of Congress." It follows, then, that the recital in the deeds, stating that the land had become useless for military purposes, made by the Secretary of War, must be considered as the act of the President. The abandonment of the site for all public purposes, excepting the part reserved for the light-house, as to which no question is made, was as perfect as its reservation had been. It was reserved from sale by the President, acting through the War Department, and it was abandoned by him through the same instrumentality. Mr. Justice McLean says, in the case of *The United States vs. The Railroad Bridge Company*, "when he (the President) finds the place no longer useful as a military post, or for any other public purpose, he has a right to abandon it, and notify the land offices where the reservation was entered. The entry on the books of the land offices within which the reserved site is situated, and the occupancy of the place by the government, are the only evidence of the reservation. And when this evidence is withdrawn, and the site is abandoned, the reserve falls back into the mass of the public lands subject to be sold under the general law." There is nothing in this opinion which renders it necessary that any particular formality should attend the act of abandonment. In the case of the Fort Armstrong reservation, there was a resolution of the Senate calling on the Secretary of War for information, whether the site was required for military purposes. The Secretary, in answer, transmitted reports from the Adjutant General and the Quartermaster General, both stating that the reserve was no longer necessary for military purposes, and said that it was no longer thus necessary, and that "it is hereby relinquished, and placed at the disposal of the department which has charge of the public lands." Upon this state of facts, Mr. Justice McLean says that when the President finds the

place no longer useful, &c., he has a right to abandon it, and the reserve falls back into the mass of public lands. But he does not say, nor intimate, that it was necessary for the War Department formally to place the site at the disposal of the department having charge of the public lands. When a site has been actually and permanently abandoned by competent authority, to require that a formal letter should be written by one department to another, is to sacrifice the sense to the sound, the substance to the form. The President, in pursuance of his legal authority, abandons a certain military reservation. What more can he do? When one department makes an official communication to another, it is the President who speaks. When the President has abandoned a military reserve, he can, as the head of the War Department, write to the President as the head of the Department of the Interior, communicating the fact of the abandonment. It is supposed that something more than the mere abandonment is necessary, before the reserve can become a part of the public lands. It is difficult to see what this can be, unless there be some not very obvious virtue in his informing himself as chief of the Department of the Interior, what he has done as chief of the Department of War.

Mr. Justice McLean was trying a case in which, in addition to the fact of abandonment by the President, through the War Department, there had been a formal statement placing it at the disposal of the Department of the Interior. The learned judge very truly says that the abandonment was as complete as the reservation by all the authorities by whom it was selected or used. But he does not say that anything more than an abandonment, without a formal transfer, was necessary. Suppose the Secretary of War had contented himself with saying to the Secretary of the Treasury, upon enclosing to him the reports of the officers, that the site of Fort Armstrong was no longer necessary for military purposes, and had said nothing about placing it at the disposal of any other department, would it still, notwithstanding, be a military reservation? It must be so, unless his placing it formally at the disposal of another department be that which gives the abandonment all its validity.

On the 14th of October, 1852, Mr. Conrad, the Secretary of War, executed a deed of the portions of the reservation desired by the Illinois Central railroad to the corporation, in pursuance of a previous negotiation. The recital in the deed is as follows: "Whereas the military site of Fort Dearborn, commonly known as Fort Dearborn reservation, at Chicago, in Cook county, Illinois, has become useless for military purposes, and the part thereof hereinafter described not being used or necessary for the site of a fort or for any other authorized purpose, has been sold by the Secretary of War, under the direction of the President of the United States, pursuant to an act, &c." The deed then proceeds to state that the United States give and grant to the railroad company all that portion of the military site or reservation of Fort Dearborn, bounded as follows, &c. Here, then, is the act and declaration of the President, by whom the tract was reserved, through the War Department, in the exercise of his undoubted authority, that the land conveyed was useless for military purposes, for the site of a fort, or for any other authorized purpose. In this state of

things the remarks of Mr. Justice McLean, in speaking of the Fort Armstrong reserve, are applicable. He says: "The possession of it was abandoned and the right of government released through the same authority by which it was appropriated, and no act has been done by the government by which a new appropriation of the ground for military or other public purposes is shown or can be presumed. The building had been sold by the government. The sale of the reserve was suspended, it is presumed, because there was no power to sell by the War Department under the act of 1819. That the suspension of the sale was in no respect influenced by a desire to retain Rock Island for any public purpose, appears by the subsequent action of the War Department." In the present case, in the year 1840, the greater part of the Fort Dearborn reservation was sold. A part was reserved for a light-house, and a marine hospital has been built on a part. The whole tract has been declared to be useless for military purposes. A certain part, not included in the light-house tract, remained unsold, and was conveyed to the railroad company. If, after all the declarations made by the authorities, the tract still remained a military reserve, no reason is perceived why it should not always remain in that condition, not to be affected by anything short of an act of Congress. But these declarations and acts were undoubtedly sufficient to cause it to lose its character as a reservation, and to fall into the mass of public lands. There seems to be nothing in the case of *The United States vs. Chicago*, (7 Howard, 185,) at all inconsistent with the rights claimed by the petitioners. Mr. Justice Woodbury, in delivering the opinion of the Court, after stating that the Secretary of War thought that a portion of the reservation might be sold, goes on to say: "He did this by an agent who first made a plan of the whole quarter section, calling it Fort Dearborn addition to Chicago, and laying it down in lots without exhibiting on it any buildings or reservations. But he did not sell the whole, the government not then concluding to part with the fort or land and buildings immediately contiguous. On that plan certain streets were also laid down running into the whole quarter section. The sales, however, being made only of the lots and land outside of what was reserved, the United States allowed the proposed streets, only so far as there laid down, to be opened by the city of Chicago, and used by the adjoining owners in conformity to the plan. And when the city undertook to open the streets within the line of reservation, and where no sales of land had been made, and where opening them would prostrate some of the public buildings, and materially injure and impair the public uses of the station, the United States applied for the injunction before named."

The judge goes on to say "the whole of them, (that is, the three questions certified) in substance, depend upon the extent and character of the rights of the United States in the place where the new streets were proposed to be opened. What, then, were those rights? 1. The place was where the title of the government had never been parted with after the original cession. 2. It was where the land had been appropriated and legally set apart for a special public use. 3. It was where the opening of these streets would essentially impair, if not destroy, that public use." Now, it is very clear, from the report of



the case, that the reservation spoken of by Judge Woodbury was the reservation of the land for a light house, which was colored *blue* in the official plat made by Birchard. Now, the claimants here set up no right to that part of section 10, about which there is no controversy whatever now, whatever there might have been between the United States and Chicago. If the claimants were now seeking to make the land reserved for the light-house a part of the public lands, the decision in *The United States vs. Chicago* might have some relevancy. Moreover, Judge Woodbury expressly avoids deciding the question how far the land of the United States may be appropriated by the States for local though public objects, because, he says, the proposition "being open to some debate is not further explained, nor is it decided here, because not necessary to a disposition of the case." The point of that case was, that the light-house reservation and buildings could not be encroached upon by the city for the purpose of making roads. The question in the present case, whether an abandonment of a reserve, which has become useless for military purposes, makes it a part of the public lands, did not arise, and no allusion is made to it.

The land, then, being a part of the "public lands," in the strictest sense of the phrase, the allegation of the claimants is, that they were entitled to the vacant land in section 10, as it was on the line of their road as located, and was an even numbered section.

It then becomes necessary to inquire into the rights conferred upon the company by the acts of Congress.

The first section of the act of September 20, 1850, (9 Stat., 466,) grants to the State of Illinois the right of way through the public lands for the construction of a railroad, one hundred feet in width.

The second section grants to the State, for the purpose of aiding in making the railroad, every alternate section of land designated by even numbers, &c.

Thus the right of way through the public lands was granted, and the land in question was a part of the public lands.

The alternate sections designated by even numbers were granted, and the land in question is a part of section ten.

Now, if any words in an act of Congress can convey lands, it is difficult to see why this land was not granted. In the first place, it had for years been abandoned as useless for military purposes; and Congress must be supposed to have known that fact. But even if it be assumed, for the purpose of the argument, that it was still a military reservation, the case will not be altered. The power of the President to reserve lands for military purposes depends upon, and is given by, acts of Congress. As an act of Congress has given him the power, an act of Congress may take it away, either wholly or in part. It will hardly be contended that the President possesses a power in such cases which an act of Congress cannot take away, or even modify. It is hardly safe to argue against the existence of such a power in Congress because it might be abused, because, for instance, Congress might pass a law conveying the Capitol to an individual, or conveying any military reservation on which were important public buildings, without an adequate consideration. The power is as safe in their hands as in those of the President for the time being; and if it is attempted to

be exercised in an improper manner, it is always in the power of the President to interpose his veto. If, after a veto, it should be passed by the constitutional majority, it will then stand like any other law, and no higher position can be claimed for it. In the present case, an act of Congress conveyed section ten to the State of Illinois; and whether it were or were not a military reservation, the act was approved by the President, and the State acquired a perfect title to the land for the purposes contemplated by the act. This title the State conveyed to the claimants by the act of February 10, 1851, incorporating the Illinois Central Railroad Company, and the claimants had, on the 14th of October, 1852, the date of their deed from the War Department, a perfect title to the land in question, to which the deed from the department could give no additional validity.

Now the United States were in possession of section ten. It was a matter of absolute necessity that the claimants should have possession of it, undisturbed by the United States, in order that the objects for which they were incorporated should be accomplished. How were they to obtain possession? They surely were not to attempt it with the strong hand? They could not contend with the troops of the United States who might have been called upon to resist them? In such a contest, they, as the weaker party, must inevitably go to the wall. Were they to delay all the operations of the railroad, to suffer all the capital embarked in the longest railroad in the world to remain stagnant, by instituting proceedings in some court for the purpose of trying titles with the United States, and at the end of some indefinite period procuring an adjudication that they were entitled to the land, when, perhaps, by that time they would have become bankrupt by the delay? They chose the more judicious course. They determined to pay the United States the sum of \$45,000 for something which the United States did not possess and could not then convey to them. They paid this sum without receiving any consideration for it, for land to which the United States had no title, and they paid it simply because the United States were the stronger party, and they could not construct their railroad without obtaining possession of the land. This payment cannot be considered, without an abuse of language, as a voluntary payment. Consent, free and untrammelled, is of the essence of a contract; and when a contract is not voluntary, it is void, because it is founded on wrong. This was the leading idea of Mr. Baron Parke in the case of *Atlee vs. Backhouse*, (3 M. and W., 650,) where he says: "There is no doubt of the proposition laid down by Mr. Erle, that if goods are wrongfully taken, and a sum of money is paid simply for the purpose of obtaining possession of those goods again, without any agreement at all, especially if it be paid under protest, that money can be recovered back; not on the ground of *duress*, because I think that the law is clear, \* \* \* but the ground is, that it is not a voluntary payment. If my goods have been wrongfully detained and I pay money simply to obtain them again, that being paid under a species of duress or constraint, may be recovered back." In the case of *Collins vs. Westbury*, (2 Bay, 211,) the law was thus stated by the court: "So cautiously does the law watch over all contracts, that it will not permit any to be binding but such as are made by persons

perfectly free and at full liberty to make or refuse such contracts, and that not only with respect to their persons, but in regard to their goods and chattels also. Contracts to be binding must not be made under any restraint or fear of their persons, otherwise they are void.

\* \* \* So, in like manner, duress of goods will avoid a contract where an unjust and unreasonable advantage is taken of a man's necessities by getting his goods into his possession, and there is no other speedy means left of getting them back again but by giving a note or bond, or where a man's necessities may be so great as not to admit of the ordinary process of law to afford him relief, as was determined in this Court after solemn argument in the case of *Susportas vs. Jennings*, (1 Bay. 470;) also in the case of *Astley vs. Reynolds*, (Strange 915.)" In the present case the necessities of the company were so great that most certainly the ordinary process of law would not afford them relief. The payment of the purchase money was not a voluntary payment, and they are entitled to recover it of the United States.

It may be remarked, in regard to the conclusive effect as evidence of facts recited in a deed, that admissions under seal are entitled to great weight on account of the deliberation implied by the nature of the instrument, if they do not even exclude any contrary statement. Between the parties to the deed, at least, they may be pleaded by way of estoppel, and though not so pleaded would generally, as between such parties, have the effect of an estoppel.—(1 Ph. Evid., 367.) Here, the recital of the fact that the land was useless for military purposes was made on the part of the United States with a perfect knowledge of everything that had been done in relation to the land; and not only so, but the President, acting through the War Department, was the person who, of all others, was bound to know everything that had been done, and what was required by the United States. If, therefore, there be any case where the recital of a fact by a grantor in a deed of which he possesses peculiar means of information can be received as conclusive evidence of such fact, the present is a case of that description.

But there is another and independent ground on which the claimant's case may be rested, and that is the right of eminent domain which the State of Illinois possesses, like the other States of the Union.

The third section of the Illinois statute of February 10, 1851, incorporating the company, gives to the corporation a right of way two hundred feet in width throughout its entire length, upon land which they may appropriate to their sole use, and authorizes them to "enter upon and take possession of and use all and singular any land, streams, and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, &c., &c."

If the State of Illinois, in virtue of her sovereign authority, may not authorize the construction of railroads through the public lands of the United States, then any grantee of the United States, after the construction of a railroad, could legally put a stop to it and destroy its existence. But this right has never been contended for, or even supposed to exist.

The 3d section of the charter provides that when lands owned (by) or belonging to any *person, company, or corporation*, cannot be obtained

by voluntary grant or release, they may be taken and paid for, if any damages are awarded, in the manner provided in an act to provide for a general system of railroad incorporations, approved November 5, 1849. It is immaterial and irrelevant now to inquire what steps are necessary to be taken by the statute law of Illinois, before a railroad can be legally constructed. It is sufficient for the present purpose to say, that it does not appear that the United States have ever objected that all the necessary steps were not taken by the corporation. And it is further obvious that the United States do not constitute such a *person, company, or corporation*, as the statute of Illinois contemplates. That statute intends by a *person*, an individual; by a *company*, an association of individuals; and by a *corporation*, a number of individuals with certain powers, privileges, and liabilities specified and defined by the laws of the State. The United States do not come within either of these categories. They do not constitute an individual, nor are they an association of individuals, nor are they an incorporated company, in the obvious and usual meaning of those words. The United States constitute a government with certain specified powers delegated to it by the Constitution. They are no more a person, company, or corporation, than either one of these three is a government, and although certain attributes of government belong alike to all natural and artificial persons and certain attributes of the latter belong to all governments, yet the term proper to convey the idea of one class cannot be used to express the idea of the other class, without a confusion of language. We must suppose that the legislature of Illinois had a distinct idea which they intended to express, and that they used the proper words to convey their ideas. If they had meant to include the United States in their classification of owners of property, they would have used more appropriate language. But apart from any critical examination of the meaning of terms, it is very clear that they had no reference to the United States; for at no time, nor under any circumstances, nor in any of the numerous descriptions of roads which have at various times been made by the several States through the public lands, have damages or compensation ever been demanded by the United States, or paid to them. Ample compensation has always been found in the facts that no taxes are assessed on the United States, and that the value of the alternate sections of land retained by them has been increased, almost to a fabulous amount, by the location of railroads through the public domain.

It is not necessary to raise the question whether, under any circumstances, the right of eminent domain possessed by a State extends to land reserved and actually occupied by the United States for some public purpose. That question cannot arise here, because the land in controversy is independent of the tract occupied for the light-house and hospital, and the United States have actually conveyed it. It must therefore be considered simply as land owned by the United States within the limits of a State.

In the case of the City of New York *vs.* Miln., 11 Peters, 139, the Supreme Court uses the following language: "We choose rather to plant ourselves on what we consider impregnable positions. They are these: That a State has the same undeniable and unlimited jurisdic-

tion over all persons and things within its territorial limits as any foreign nation, where that jurisdiction is not surrendered or restrained by the Constitution of the United States. That, by virtue of this, it is not only the right, but the bounden and solemn duty of a State to advance the safety, happiness, and prosperity of its people, and to provide for its general welfare, by any and every act of legislation which it may deem conducive to those ends, where the power over the particular subject or the manner of its exercise is not surrendered or restrained in the manner just stated. That all those powers which relate to merely municipal legislation, or what may, perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a State is complete, unqualified, and exclusive. We are aware that it is difficult at all times to define any subject with proper precision and accuracy. If this be so in general, it is emphatically so in relation to a subject so diversified and multifarious as the one which we are now considering. If we were to attempt it, we should say that every law came within this description which concerned the welfare of the whole people of a State, or any individual within it; whether it related to their rights or their duties; whether it respected them as men or as citizens of the State; whether in their public or private relations; whether it related to the rights of persons or of property, of the whole people of a State, or of any individual within it, and whose operation was within the territorial limits of the State, and upon the persons and things within its jurisdiction." In the case of *The West River Bridge Company vs. Dix*, 6 Howard, 531, Mr. Justice Daniel says: "It cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large." This power, he says, "is denominated the *eminent domain* of the State," and he adds, "the Constitution of the United States, although adopted by the sovereign States of this Union, and proclaimed in its own language to be the supreme law for their government, can by no rational interpretation be brought to conflict with this attribute in the States; there is no express delegation of it by the Constitution, and it would imply an incredible fatuity in the States to ascribe to them the intention to relinquish the power of self-government and self-preservation." Mr. Justice McLean speaks of the "eminent domain, which belongs to their sovereignties, as essential for the advancement of internal improvement, and acts only upon property within their respective jurisdictions." Mr. Justice Woodbury says that the eminent domain has "never been granted to the general government, so far as respects the public highways of a State, and that it extends to the taking for public use for a road any property in the State, suitable and necessary for it." "Though the right of eminent domain exists in some cases, it does not exist in all, nor as to all property, but probably as to such property only as from its locality and fitness is necessary to the public use." "The doctrine that the right of eminent domain exists for every kind of public use, or for such a use when merely convenient, though not necessary, does not seem to me by any means clearly main-

tainable. It is too broad, too open to abuse. Where the public use is one general and pressing, like that often in war for sites of batteries, or for provisions, little doubt would exist as to the right." *Salus populi suprema est lex.* So as to a road, if really demanded in particular forms and places to accommodate a growing and changing community, and to keep up with the wants and improvements of the age, such as its pressing demands for easier and social intercourse, quicker political communication, or better internal trade, and advancing with the public necessities from blazed trees to bridle paths, and thence to wheelroads, turnpikes, and railroads." It is not understood that such doctrines as the above extracts contain, are open to any serious doubt or comment. Authorities might be accumulated upon them, but it is sufficient to refer to the opinion of Mr. Justice McLean in the Rock Island Bridge case, before cited. Upon this subject the learned judge expresses himself as follows :

"That the State of Illinois had power to grant the charters for the road and the bridge, has not been questioned. A doubt might once have been entertained whether a State could, under the power of eminent domain, confer the power of appropriation to private companies ; but this power has been so long exercised and acquiesced in that it is now, probably, too late to question it.

"Whether a State has power by an act of incorporation or otherwise, to authorize a rail or turnpike road through the lands of the United States, has not, it is believed, been raised or judicially decided. The first impression would be, probably, that a State can exercise no such power. But first impressions are rarely to be followed on constitutional questions. They should be deliberately and deeply considered, in relation to their bearing on the federal and State powers. That the federal government is one of enumerated powers, is not controverted ; nor that the States reserved to themselves all powers not conferred on the general government absolutely or by necessary implication.

"In the admission of the new States into the Union, compacts were entered into with the federal government, that they would not tax the lands of the United States. This implies that the States had power to tax such lands, if unrestrained by compact.

\* \* \* \* \*

"The proprietary right to lands in a State held by the federal government is, in many respects, similar to that of an individual. A compact may exempt the lands of either from taxation. An action may be brought by either for an injury done the soil or timber. A conveyance of the title is made by the federal government under its own laws ; and by the individual under the laws of the State. The principal distinction between the two proprietorships is, that the government makes the conveyance under its own laws, and sues in its own courts, whilst an individual proprietor conveys under the laws of the State, and prosecutes under those laws for an injury done. But the important inquiry is, whether the public lands are subject to the sovereignty of the State in which they are situated.

"It is a fair implication, that if the State were not restrained by compact, it could tax such lands. In many instances the States have

taxed the lands on which our custom-houses and other public buildings have been constructed, and such taxes have been paid by the federal government. This applies only to the lands owned by the government, as a proprietor, the jurisdiction never having been ceded by the State.

“The proprietorship of land in a State by the general government cannot, it would seem, enlarge its sovereignty, or restrict the sovereignty of the State. This sovereignty extends to the State limits over the territory of the State, subject only to the proprietary right of the lands owned by the federal government, and the right to dispose of such lands and protect them under such regulation as it may deem proper.

“The State organizes its territory into counties and townships, and regulates its process throughout its limits. And in the discharge of its ordinary functions of sovereignty a State has a right to provide for an intercourse between its citizens, commercial and otherwise, in every part of the State, by the establishment of easements, whether they may be common roads, turnpike, plank, or railroads. The kind of easement must depend upon the discretion of the legislature. And this power extends as well over the lands owned by the United States as those owned by individuals.

“This power, it is believed, has been exercised by all the States in which the public lands have been situated. It is a power which belongs to the State, and the exercise of which is essential to the prosperity and advancement of the country. State and county roads have been established and constructed over the public lands in a State under the laws of the State, without any doubt of its power, and with the acquiescence of the federal government. In this respect the lands of the public have been treated and appropriated by the State as the lands of individuals. These easements have so manifestly conduced to the public interest that no objection, from any quarter, has hitherto been made. And it is believed that this power belongs to the States.

“It is difficult to perceive on what principle the mere ownership of land by the general government within a State should prohibit the exercise of the sovereign power of the State in so important a matter as the easements named. In no point of view are these improvements prejudicial to the general interest; on the contrary, they greatly promote it. They encourage population, and increase the value of land. In no respect is the exercise of this power by the State inconsistent with a fair construction of the constitutional power of Congress over the public lands. It does not interfere with the disposition of the lands, and, instead of lessening, enhances their value.

“Where lands are reserved or held by the general government for specified and national purposes, it may be admitted that a State cannot construct an easement which shall, in any degree, affect such purposes injuriously. No one can question the right of the federal government to select the sites for its forts, arsenals, and other public buildings. The right claimed for the State has no reference to lands specially appropriated, but to those held as general proprietor by the government, whether surveyed or not.

"The right of eminent domain appertains to a State sovereignty, and it is exercised free from the restraints of the federal Constitution. The property of individuals is subject to this right, and no reason is perceived why the aggregate property in a State of the individuals of the Union should not also be subject to it. The principle is the same, and the beneficial result to the proprietors is the same in proportion to their interests. These easements have their source in State power, and do not belong to federal action. They are necessary for the public at large, and essential to the interests of the people of the State.

"The powers of a State to construct a road necessarily implies the right not only to appropriate the line of the road, but the materials necessary for its construction and use.

"Whether we look to principle, or the structure of the federal and State governments, or the uniform practice of the new States, there would seem to be no doubt that a State has the power to construct a public road through the public lands.

"A grant to this effect is sometimes made by Congress, as in the act of 1852; but this does not show the necessity of such a grant. Generally, Congress appropriates to the road a large amount of lands. The positions are believed to be irrefragable—first, that the right of eminent domain is in the State; and, secondly, that the exercise of this right by a State is nowhere inhibited, expressly or impliedly, in the federal Constitution, or in the powers over the public lands by that instrument, in Congress."

These views are unquestionably sound. They bear the marks of much and careful reflection upon the subject, and are consistent both with the theory of the Constitution and with the language by which its powers are delegated to the general government. They have a peculiar application here, as the case is so similar in several aspects to that which called them forth.

The results to which my examination of this case has led me are as follows: The Fort Dearborn reservation had become useless and abandoned for military purposes as long ago as the year 1840, and also for any public purposes, except as to that part reserved from sale by Birchard, and used for a light-house and marine hospital. It was then a part of the "public lands," and was embraced by the act of Congress of September, 1850.

But even taking it for granted that it was not, technically speaking, a part of the "public lands," it was land owned by the United States, and the part conveyed to the company was not used by the United States for any purpose whatever, and, being an even numbered section, was granted in terms by the act.

Further, the State of Illinois had the right of eminent domain over the land, and her exercise of it did not interfere with any right reserved by the United States to use the tract conveyed to the company for any public purpose.

The land, then, was the property of the company at the date of the deed from the Secretary of War, in October, 1852. The payment of the purchase-money, \$45,000, by the company cannot be regarded as



a voluntary payment under the circumstances. It was money received by the United States without consideration, and it should therefore be repaid to the claimants.













